The Foreign Sovereign Immunities Act

A Guide for Judges

Second Edition

Federal Judicial Center
2018

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Judicial Center
International Litigation Guide

The Foreign Sovereign Immunities Act: A Guide for Judges

Second Edition
2018

Federal Judicial Center
International Litigation Guide

The Foreign Sovereign Immunities Act: A Guide for Judges

Second Edition

David P. Stewart
Professor from Practice
Georgetown University Law Center

Federal Judicial Center
2018

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct education programs for the judicial branch. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

first printing

Contents

Preface to the Second Edition, ix
I. Introduction, 1
 A. The First Basic Rule, 2
 B. The Second Basic Rule, 3
 C. Typical Cases, 3
II. Purpose, Scope, and Rules of Application, 5
 A. Purpose, 8
 B. Scope, 8
 C. Basic Rules of Application, 9
 1. Exclusivity, 10
 2. Retroactivity, 10
 3. Treaty exception, 10
 4. Other types of immunity, 11
 5. Works of art, 13
 6. Act of state, 14
 7. Political question, 14
III. Jurisdictional, Procedural, and Evidentiary Issues, 17
 A. Subject-Matter Jurisdiction, 17
 B. Personal Jurisdiction: Service of Process, 18
 1. Foreign states and political subdivisions, 18
 2. Agencies and instrumentalities, 20
 3. Minimum contacts, 20
 C. Venue, 22
 D. Applicable Law, 23
 E. Procedural and Evidentiary Issues, 25
 1. Pleading standards, 26
 2. Jurisdictional discovery, 28
 3. Interpleader, 30
 4. Non-jury trial, 30
 5. Damages, 30

6. Default, 31
7. Appeal, 31

IV. Entities and Persons Entitled to Immunity, 33
A. Foreign States, Components, and Political Subdivisions, 33
1. Foreign state or government, 33
2. Internal government components, 34
3. Government departments and ministries, 35
B. Agencies and Instrumentalities, 36
1. Separate legal entity, 36
2. Second criterion, 39
3. Non-U.S. nationality, 44
C. Individual Foreign Officials and Agents, 44

V. Exceptions to Immunity, 47
A. Waiver, 48
1. Express waivers, 48
2. Implied waivers, 49
B. Commercial Activity, 50
1. Definition of commercial activity, 51
2. "Based upon," 56
3. Jurisdictional nexus, 57
C. Expropriations, 64
1. Rights in property, 65
2. Taken in violation of international law, 66
3. Commercial nexus, 69
D. Noncommercial Torts in the United States, 70
1. Discretionary functions excluded, 71
2. Not extraterritorial, 71
3. Damages, 72
4. Examples, 72
E. Arbitration, 74

F. State-Sponsored Terrorism, 77
1. Section 1605A, 78
2. Limitations, 78
3. Designated state sponsors, 78
VI. Attachment and Execution, 81
A. Pre-judgment Attachment, 82
B. Post-judgment Attachment and Execution, 82
1. States vs. agencies and instrumentalities, 83
2. Excepted categories of property, 84
3. Procedure, 85
4. Post-judgment discovery, 87
5. Sanctions, 89
C. Property of a Foreign State, 90
1. Location of the property 90
2. Used for a commercial purpose, 92
3. Additional requirements, 94
4. State sponsors of terrorism, 95
D. Agency or Instrumentality, 96
VII. The FSIA and State-Sponsored Terrorism, 97
A. Background and Purpose, 99
B. The Current Exception, 102
1. Federal cause of action, 103
2. Third-party (or indirect) actions, 105
3. Exclusivity, 106
4. Applicable law/choice of law, 108
5. Statute of limitations, 109
6. Default, 109
7. Discovery, 110
C. Main Elements of a Claim Under § 1605A, 110
1. Designated state sponsor of terrorism, 110
2. Listed acts, 112
3. Scope of authority, 117
4. Causation, 118

5. Personal injury or death, 121
6. Opportunity to arbitrate, 121
7. Damages, 122
8. Application of § 1605A to prior suits, 124
9. Challenges to the legality of the exception, 126

D. Execution of Judgments in § 1605A Cases, 126
1. Generally, 127
2. Protected properties, 128
3. Section 1610, 129
4. Terrorism Risk Insurance Act (TRIA), 131
5. Post-TRIA legislation, 134

E. Justice Against Sponsors of Terrorism Act (JASTA), 136

Table of Authorities, 139

About the Author, 163

Preface to the Second Edition

It is an understatement to say that the Foreign Sovereign Immunities Act frames a dynamic area of the law. In the five years since the first edition of this guide was completed, the statute has twice been amended by Congress and has been addressed by the U.S. Supreme Court on five separate occasions, by the courts of appeals in more than 150 decisions, and by the district courts in excess of 500 times.

Consistent with the aim of the original publication, however, this edition notes these developments only where relevant to providing a fundamental understanding of the statute and the main issues it presents. The guide does not attempt to compile all relevant decisions or to explore all issues in depth.

This edition does take into account, however, the publication of the *Restatement of the Law Fourth, The Foreign Relations Law of the United States* (American Law Institute 2018), which includes a substantial discussion of the law of foreign sovereign immunity as defined and applied by U.S. courts. (The author participated directly as a co-reporter in the preparation of that publication.) Relevant sections of this new edition of the Restatement are referred to at the appropriate points in the discussion.

This edition of the guide is current through November 1, 2018.

I. Introduction

This guide provides an overview of the Foreign Sovereign Immunities Act of 1976 (FSIA).[1] It is intended as a practical introduction for those who have little knowledge of or experience with the statute as interpreted and applied in U.S. courts. The focus is on the basic legal issues faced by U.S. courts in cases arising under the statute. Case discussions and citations are illustrative rather than exhaustive, and few references are made to law journal articles or other secondary sources.

Following this brief Introduction, the guide discusses the statute's purpose and scope of application. It reviews the jurisdictional, procedural, and evidentiary issues most likely to arise at the outset of litigation, and it discusses the entities entitled to immunity (in particular the distinctions between a "foreign state," its "political subdivisions," and its "agencies and instrumentalities"). It then provides a description of the specific exceptions to immunity as well as the statutory regime applicable to execution of judgments and attachment of assets. Part VII discusses the terrorism exception, which has recently been revised (again) by Congress.

The FSIA governs all litigation in both state and federal courts against foreign states and governments, including their "agencies and instrumentalities." It provides the exclusive basis for obtaining jurisdiction over these entities in U.S. courts (including special rules for service of process) and contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[2] It also

1. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602-11 (2000)).

2. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). The reference to "civil actions" does not suggest, however, that states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts; nothing in the text or legislative history supports such a conclusion.

prescribes rules regarding enforcement of judgments against foreign states and related entities.

The FSIA recognizes immunity for "public acts, that is to say, acts of a governmental nature typically performed by a foreign state, but not for acts of a private nature even though undertaken by a foreign state."[3]

A. The First Basic Rule

Under the FSIA, foreign states and governments, including their political subdivisions, agencies, and instrumentalities, are immune from suit (in both state and federal courts) *unless* one of the statute's specific exceptions applies.[4] Thus, jurisdiction exists only when one of the exceptions to foreign sovereign immunity applies. If the claim does not fall within one of the enumerated exceptions, the defendant is entitled to immunity and the courts lack *both* subject-matter and personal jurisdiction.

All FSIA cases therefore require courts to address three related questions at the outset:

1. Is the defendant a "foreign state or government" within the meaning of the statute?
2. Has valid service been made as provided by the statute?
3. Does a statutory exception to immunity apply?

If the answer to the first question is yes, the statute applies. However, even when the answers to the first and second questions are yes, the case must be dismissed if no statutory exception applies—"even in situations where the wrongfulness of the foreign sovereign's conduct is clear and indisputable."[5]

If an exception does apply, the defendant lacks immunity and jurisdiction exists, but the statute continues to govern the proceedings against qualified defendants. Reflecting the particular sensitivities of

3. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1026 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3057 (2011).

4. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 394 (2015).

5. Bell Helicopter Textron Inc. v. Islamic Republic of Iran, 892 F. Supp. 2d 219, 225 (D.D.C. 2012), *aff'd,* 734 F.3d 1175 (D.C. Cir. 2013).

litigation against foreign governmental entities, the FSIA provides these entities with certain protections and benefits, such as extended time for answering complaints, a right of removal of the case from state court to federal court, entitlement to a non-jury trial, limitations on award of punitive damages, and constraints against attachment of and execution against government property.

B. The Second Basic Rule

The statute also provides foreign states and their agencies and instrumentalities with immunity from execution of judgments and prejudgment attachments. The rules governing these issues are in some respects more restrictive than the jurisdictional rules, so a foreign state or agency or instrumentality may validly be subject to a court's jurisdiction but its property may nonetheless be insulated from execution of a resulting judgment.

C. Typical Cases

The most common FSIA cases involve claims against foreign governmental entities for breach of commercial contracts for the purchase and sale of goods or services. U.S. courts are also likely to encounter suits involving the expropriation of property in a foreign country, torts committed in the United States (such as automobile accidents and slip-and-fall injuries), enforcement of foreign arbitral awards, and death or injury resulting from acts of state-sponsored terrorism abroad. The exceptions governing these situations (along with waivers of immunity) are discussed in some detail in the following sections.

II. Purpose, Scope, and Rules of Application

Historically, like most nations, the United States accorded foreign states and governments "absolute" immunity from suit in domestic court.[6] In 1952, however, the Department of State adopted the "restrictive" theory of sovereign immunity in the so-called "Tate Letter,"[7] reflecting its view that customary international law had evolved to permit adjudication of disputes arising from a state's commercial activities (*acta jure gestionis*) while preserving immunity for sovereign, or "public," acts (*acta jure imperii*).[8]

Twenty-four years later, the FSIA codified and expanded upon that "restrictive" approach toward immunity, adding several other exceptions.[9] Since then, the FSIA has provided "the sole basis for obtaining jurisdiction over a foreign state in our courts."[10] As the U.S. Supreme Court has observed, the statute supplies a "comprehensive set of legal

6. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812), in which Chief Judge John Marshall recognized the existence of "a class of cases in which every sovereign is understood to wave [*sic*] the exercise of a part of its complete exclusive territorial jurisdiction" over other sovereigns (in that case, a foreign warship), based on principles of "public law" and "common usage." As described in *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955), the doctrine was "one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign."

7. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952) [hereinafter Tate Letter], *reprinted in* 26 Dep't St. Bull. 984–85 (1952); *see also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976).

8. Under the "restrictive" theory, foreign states retain immunity for sovereign public acts but not for private commercial acts. *See* Republic of Austria v. Altmann, 541 U.S. 677, 689–91 (2004).

9. Pub. L. No. 94–583, 90 Stat. 2891.

10. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

standards governing claims of immunity in every civil action against a foreign state."[11]

It has sometimes been suggested that the courts initially considered the acceptance of foreign sovereign immunity to be only "a matter of grace and comity" rather than a restriction imposed by the Constitution or a reflection of customary international law.[12] That particular phrase is nowhere to be found, however, in Chief Justice Marshall's seminal opinion in *The Schooner Exchange*, which by distinction refers to the usage and principles adopted by the unanimous consent of nations—what today we refer to as customary international law.[13]

The Tate Letter, moreover, was clearly premised on the U.S. understanding of evolving principles of customary international law, and the FSIA itself was expressly understood to reflect and codify those principles.[14] Today, there can be little question that sovereign immunity reflects principles of customary international law and is not based simply upon discretionary notions of "comity" or mutual respect.[15]

11. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983).

12. *Id.* This suggestion has been repeated with distressing frequency; see, e.g., *Leibovitch v. Islamic Republic of Iran*, 297 F. Supp. 3d 816 (N.D. Ill. 2018).

13. In fact, Marshall was quite clear on this point: "It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." The Schooner Exchange v. McFaddon, 11 U.S. 116, 145–46 (1812).

14. *See* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2255 (2014), noting that in adopting the FSIA, Congress "replac[ed] the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state'" (citing Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004)).

15. "The Act for the most part embodies basic principles of international law long followed both in the United States and elsewhere." Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017). Congress understood the FSIA to reflect such principles. *See* H.R. Rep. No. 94-1487 (1976), at 6606 ("Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.") and 6613 ("Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the

Moreover, while determinations of immunity had traditionally been made by the executive branch and communicated to the judiciary by way of "suggestions of immunity,"[16] the statute shifted the decision making from the Department of State to the courts.[17]

Nonetheless, the courts have recognized that actions against foreign sovereigns may well "raise sensitive issues concerning the foreign relations of the United States."[18] Because the U.S. government has a significant interest in the proper application of the FSIA, its views can be considered, and in fact have been sought with some frequency, in appropriate cases.[19]

judiciary on the basis of a statutory regime which incorporates standards recognized under international law."). *See also* Restatement (Fourth) of Foreign Relations Law § 451 (Am. Law Inst. 2018) ("Under international law and the law of the United States, a state is immune from the jurisdiction of the courts of another state, subject to certain exceptions.").

16. The term "suggestion of immunity" denotes the formal communication by which the executive branch traditionally communicates its decision to recognize a defendant's immunity (for example, as a head of state or a foreign diplomat or other governmental official) without either intervening as a party or taking sides on an issue otherwise to be decided by the court. In contrast, when the views of the government are offered at the trial level in any case to which it is not a party, they are typically submitted in a "statement of interest." The specific label, however, is not necessarily determinative. *See generally* 28 U.S.C. § 517 (2006).

17. As noted in *Samantar v. Yousuf*, 560 U.S. 305, 323 n.19 (2010), the State Department both sought and supported the transfer of this function to the court.

18. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983).

19. *See, e.g.,* Schermerhorn v. Israel, 235 F. Supp. 3d 249 (D.D.C. 2017), and Weinstein v. Islamic Republic of Iran, 831 F.3d 470 (D.C. Cir. 2016). The Supreme Court has often asked for the government's views, for example, in *Harrison v. Republic of Sudan*, 838 F.3d 86 (2d Cir. 2016), *petition for cert. docketed* Mar. 10, 2017 (No. 16-1094), and *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312 (2017). *Cf.* Republic of Austria v. Altmann, 541 U.S. 677, at 701 (2004) ("nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity").

A. Purpose

The FSIA created a clear statutory basis for the judiciary's adjudication of claims by foreign sovereigns that they are immune from suit in U.S. courts. As stated in 28 U.S.C. § 1602,

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

B. Scope

Application of the statute depends in the first instance on whether the defendant is a *foreign state or government*. For FSIA purposes, no distinction is drawn between the "state" and its "government." Thus, the statute applies whether the named defendant is, for example, China, the People's Republic of China, the Government of China, or one of its integral governmental components (such as the National People's Congress, the People's Liberation Army, or the Ministry of State Security).[20]

However, § 1603(a) raises an additional distinction by defining the term "foreign state" to include (1) a *political subdivision* of a foreign state and (2) an *agency or instrumentality* of a foreign state. As discussed in more detail below, the meaning of these terms can be elusive and somewhat confusing.

In most circumstances, internal "political subdivisions" are readily equated with the state (or government). To continue the example above, a suit against one or more of China's twenty-three provinces,

20. For FSIA purposes, integral government departments, bureaus, services, and agencies should presumptively be considered part of the government itself, rather than separate "political subdivisions."

five autonomous regions, or four municipalities would be treated the same as a suit against the state or government.[21]

However, if the defendant qualifies as a separate "agency or instrumentality" (such as the National Bauxite Trading Company of China), the statute's rules for "agencies and instrumentalities" would apply. This important distinction between the sovereign itself and its separate agencies and instrumentalities is reflected throughout the FSIA and has concrete legal consequences, including those with respect to service of process, venue, punitive damages, attachment, and execution.

The statute does not apply to suits against heads of state or government, to accredited diplomats or consular officers, or to other individual foreign officials in their personal capacity.[22] This issue is addressed in Part IV.C *infra*.

C. *Basic Rules of Application*

The basic rule, as stated in the statute, is the following:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act[,] a foreign state is immune from suit in any civil action in any court of the United States unless, and to the extent that, one of the exceptions set forth in §§ 1605–1607 applies.[23]

In other words, there is a statutory presumption in favor of immunity for entities that meet the definition of "foreign state." The specific exceptions in 28 U.S.C. §§ 1605–1607 are discussed in Part V *infra*. It is useful to keep in mind several other essential principles and distinctions.

21. In much the same way, New York State, New York County, and New York City are considered "political subdivisions" of the United States.

22. Samantar v. Yousuf, 560 U.S. 305 (2010).

23. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country" and renders a foreign government "presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies." OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 394 (2015). *See* 28 U.S.C. § 1330(a) (conferring jurisdiction over "any claim . . . with respect to which the foreign state is not entitled to immunity"). *See also* Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

1. Exclusivity

In *Argentine Republic v. Amerada Hess Shipping Corp.*, the U.S. Supreme Court held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court "[24] In so doing, the Court rejected the argument that preexisting jurisdictional provisions (such as the Alien Tort Statute, codified at 28 U.S.C. § 1350, and general admiralty and maritime jurisdictional statutes) authorized alternative and independent bases for suit against foreign states for violations of international law. Thus, if the defendant qualifies as a "foreign state," the suit must be adjudicated under the FSIA.[25]

2. Retroactivity

The statute applies regardless of whether the conduct that is the subject of the suit occurred before or after the FSIA was enacted.[26] Whether the statute's basic jurisdictional requirement is met (i.e., whether the entity in question qualifies as a foreign state), however, depends on "the state of things at the time the action [is] brought."[27]

3. Treaty exception

Because immunity under the FSIA is expressly made "[s]ubject to existing international agreements to which the United States [was] a party at the time of" the statute's enactment, immunity may be based on an international agreement to which the United States was a party in 1976,

24. 488 U.S. 428, 439 (1989); *see also* Republic of Argentina v. Weltover, 504 U.S. 607, 611 (1992).

25. *Cf.* Micula v. Government of Romania, 714 F. App'x 18 (2d Cir. 2017) (FSIA as exclusive mechanism for enforcing ICSID award).

26. Republic of Austria v. Altmann, 541 U.S. 677 (2004). Writing for the majority, Justice Stevens said that "Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged 'standards' that the FSIA replaced." *Id.* at 699.

27. Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003).

to the extent there is an express conflict between the FSIA's terms and the terms of the agreement.[28]

4. Other types of immunity

Foreign sovereign immunity differs from, but is sometimes confused with, head of state immunity as well as diplomatic and consular immunity, foreign official immunity, and the immunities of international organizations.

In U.S. law, head of state immunity arises from rules of customary international law and applies to visiting heads of state and government and certain other individuals (such as foreign ministers).[29] Former heads of foreign states are entitled to a more limited form of immunity.[30] By contrast, diplomatic and consular immunities are based on treaty law and apply to individual representatives of foreign governments (e.g., ambassadors, embassy officials, consuls) who have been duly accredited by their governments to the Department of State.[31]

28. *See, e.g.*, de Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017), *petition for cert. docketed* No. 17-1165 (Feb. 16, 2018); Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016); Moore v. United Kingdom, 384 F.3d 1079 (9th Cir. 2004) (NATO Status of Forces Agreement); 767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire, 988 F.2d 295 (2d Cir. 1993) (UN Charter, UN Headquarters Agreement, Convention on Privileges and Immunities of the United Nations, and Vienna Convention on Diplomatic Relations). Later-in-time treaties, such as bilateral investment treaties, are clearly excluded. *See, e.g.*, S.K. Innovation, Inc. v. Finpol, 854 F. Supp. 2d 99, 114–15 (D.D.C. 2012).

29. *See, e.g.,* Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004); Hmong I v. Lao People's Democratic Republic, No. 2:15-cv-2349 TLN AC, 2016 WL 2901562 (E.D. Cal. May 17, 2016); Sikhs for Justice v. Singh, 64 F. Supp. 3d 190 (D.D.C. 2014). *Cf.* Manoharan v. Rajapaksa, 711 F.3d 178 (D.C. Cir. 2013); Habyarimana v. Kagame, 821 F. Supp. 2d 1244 (W.D. Okla. 2011), *aff'd,* 696 F.3d 1029 (10th Cir. 2012). Along with heads of state and government, members of their immediate family and accompanying "entourage" may also be covered. Hazel Fox & Philippa Webb, The Law of State Immunity (3d ed. rev. 2015), at 544–67.

30. *See, e.g.,* Giraldo v. Drummond Co., 808 F. Supp. 2d 247 (D.D.C. 2011), *aff'd per curiam*, 493 F. App'x 106 (D.C. Cir. 2012).

31. *See, e.g.,* United States v. Al Sharaf, 183 F. Supp. 3d 45 (D.D.C. 2016); Rana v. Islam, 305 F.R.D. 53 (S.D.N.Y. 2015); United States v. Khobragade, 15 F. Supp. 3d 383 (S.D.N.Y. 2014); Gomes v. ANGOP, Angola Press Agency, No. 11-CV-

As discussed in more detail below,[32] immunity under the statute must also be distinguished from the immunities accorded to certain other visiting foreign officials, which also derive from customary international law. As a general matter, the FSIA does not apply to individual governmental officials.[33]

The immunities of most international organizations in the United States are governed by separate instruments.[34] International organizations themselves will not meet the definition of a "foreign state," and the immunities they enjoy in U.S. law typically flow from their constitutive documents (e.g., the UN Charter or the World Bank Articles of Agreement), from a relevant treaty obligation (such as the Convention on Privileges and Immunities of the United Nations), or from the International Organizations Immunities Act, but not from the FSIA.[35]

0580 (DLI) (JO), 2012 WL 3637453 (E.D.N.Y. Aug. 22, 2012), *aff'd*, 541 F. App'x 141 (2d Cir. 2013); Politis v. Gavriil, Civil Action No. H-08-2988, 2008 WL 4966914 (S.D. Tex. Nov. 19, 2008). Immunity depends in the first instance on certification by the executive branch that the individual is so entitled as an accredited diplomat or consular officer.

32. *See infra* section IV.C.

33. Samantar v. Yousuf, 560 U.S. 305, 314–15 (2010). The court left open the possibility that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his or her official capacity and that individual officials acting in their official capacities may otherwise be entitled to immunity under the common law. *Id.* at 322–24.

34. Including (but not limited to) the International Organizations Immunities Act (IOIA), Dec. 29, 1945, ch. 652, Title I, 59 Stat. 669 (codified as amended at 22 U.S.C. §§ 288a–288*l*). *See, e.g.*, Jam v. International Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017), *cert. granted,* 138 S. Ct. 2026, May 21, 2018; Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335 (D.D.C. 1998). Questions concerning the status of the United Nations require reference, inter alia, to the UN Participation Act, 22 U.S.C. § 287 (2011), the 1947 UN Headquarters Agreement, 22 U.S.C. § 287 note (2011), and the Convention on Privileges and Immunities of the United Nations, *opened for signature* Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force with respect to the United States Apr. 29, 1970).

35. *See* Georges v. United Nations, 834 F.3d 88 (2d Cir. 2016); Laventure v. United Nations, 279 F. Supp. 3d 394 (E.D.N.Y. 2017) (app. pending); *cf.* Prewitt Enters., Inc. v. Organization of Petroleum Exporting Countries, 353 F.3d 916, 922 n.9 (11th Cir. 2003) (FSIA held inapplicable to OPEC because it is not a foreign

5. Works of art

Foreign-owned works of art on loan to U.S. museums are generally covered by a separate statute, the Immunity from Seizure Act (22 U.S.C. § 2459).[36] The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016[37] added § 1605(h) to the FSIA, providing that activities of a foreign state associated with the temporary exhibition or display of works of art in the United States shall not be considered "commercial activity" within the meaning of the expropriation exception (§ 1605(a)(3)) if (inter alia) the President determines that the artwork is "of cultural significance" and its temporary exhibition or display is in the national interest.

The Holocaust Expropriated Art Recovery Act of 2016[38] created a six-year statute of limitations for beginning civil actions to recover works of art or other property confiscated during the period January 1, 1933–December 31, 1945.

state or political subdivision in its own right); European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189 (E.D.N.Y. 2011). For the U.S. government's view that the European Community (EC) is an agency or instrumentality and thus covered by the FSIA, see its brief amicus curiae in *European Community v. RJR Nabisco*, No. 11-2475-CV, 2011 WL 4734329 (2d Cir. Oct. 5, 2011).

36. *See, e.g.*, Magness v. Russian Fed'n, 84 F. Supp. 2d 1357 (S.D. Ala. 2000). Foreign seizures of art and other culturally significant works have occasionally been the subject of actions under the "expropriation" exception to the FSIA. *See, e.g.,* Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934 (D.C. Cir. 2008); Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).

37. Pub. L. No. 114–319, Dec. 16, 2016, 130 Stat. 1618 (codified at 28 U.S.C. § 1608(h) (2016)), responding to Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 328–30 (D.D.C. 2007). Exceptions are provided for "Nazi-era claims" and claims that the property was taken as part of a "systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."

38. Pub. L. No. 114-308, 130 Stat. 1524 (2016) (codified at 22 U.S.C. § 1621 note), applied in Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 1992 (2018).

6. Act of state

Foreign sovereign immunity is sometimes confused by litigants with the "act of state" doctrine. Under that judicially fashioned doctrine, U.S. courts do not "sit in judgment on the validity of the acts" of another government performed under its law and within its own territory.[39] However, the U.S. Supreme Court has held that "act of state" issues "only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine."[40]

7. Political question

Foreign sovereign immunity must also be distinguished from the "political question" doctrine, which can operate to preclude judicial review of claims that call into question the decisions of the legislative and executive branches in matters of foreign policy or national security constitutionally committed to their discretion.[41] In light of the FSIA's specific grants of jurisdiction, courts have been reluctant to find that cases falling within the statutory exceptions raise "political questions," but

39. Ricaud v. American Metal Co., 246 U.S. 304, 309–10 (1918). This doctrine is of course subject to various exceptions. *See also* Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964).

40. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 406 (1990). For recent discussions of the doctrine, see *Sea Breeze Salt, Inc. v. Mitsubishi Corp.,* 899 F.3d 1064 (9th Cir. 2018); *Von Saher v. Norton Simon Museum of Art at Pasadena,* 897 F.3d 1141 (9th Cir. 2018); and *Nnaka v. Federal Republic of Nigeria,* 238 F. Supp. 3d 17, 31–34 (D.D.C. 2017). *See also* Restatement (Fourth) of Foreign Relations Law § 441 (Am. Law Inst. 2018). In *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015), *cert. denied,* 136 S. Ct. 800 (2016), the court noted that the act of state doctrine can overlap with the FSIA's expropriation exception and the two should be interpreted consistently.

41. Baker v. Carr, 369 U.S. 186 (1962); Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189 (2012); *cf.* Republic of Austria v. Altmann, 541 U.S. 677, 715 (2004) (referring to "the most sensitive area of foreign relations").

on occasion they have found that the recognition of immunity is complementary to the "act of state" doctrine.[42]

42. *Compare* Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016), *with* Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd on other grounds,* 563 F.3d 9 (2d Cir. 2009).

III. Jurisdictional, Procedural, and Evidentiary Issues

A. Subject-Matter Jurisdiction

Under 28 U.S.C. § 1330(a), federal district courts have

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.[43]

Accordingly, in order to ascertain whether it has subject-matter jurisdiction, a court must first determine whether the defendant meets the definition of "foreign state" in § 1603(a) and then whether the claim falls within one of the stated exceptions to immunity under § 1605(a), § 1605A, or § 1605B. If the defendant qualifies and no exception applies, it is immune and the court lacks both personal and subject-matter jurisdiction (even if proper service has been made). In contrast, if the claim falls within an exception to immunity (and if proper service has been made), the court has personal and subject-matter jurisdiction.

This unusual formula—conditioning subject-matter jurisdiction on the absence of immunity—creates some unique consequences, the most important of which is that it imposes an obligation on the court to determine the question of immunity as a first order of business in *all* cases. "[E]ven if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under this Act."[44]

43. 28 U.S.C. § 1330(a) (2010).

44. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 n.20 (1983). *See also* 28 U.S.C. § 1604: "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Cf.* Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

At the same time, because immunity can be waived (see the discussion of § 1605(a)(1) in Part V.A *infra*), a foreign state defendant in effect has the ability to provide the court with "subject-matter jurisdiction" it might otherwise lack in the given case.

B. Personal Jurisdiction: Service of Process

Under the statute, subject-matter jurisdiction together with valid service equals personal jurisdiction. As stated in § 1330(b), "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."[45]

Section 1608 prescribes the exclusive means of service on both foreign states and their agencies and instrumentalities.[46] These provisions are mandatory, but alternatives are specified in descending order of preference.

Under § 1608(d), both states and their agencies and instrumentalities have sixty days from date of service to answer or respond to a complaint. In practice, however, effecting (and establishing proof of) service can be time-consuming and fraught with delays.

1. Foreign states and political subdivisions

Service on a foreign state or its political subdivisions must follow the requirements of § 1608(a). While compliance is mandatory, that section offers four alternative service methods, in a descending hierarchy:

1. pursuant to a special arrangement between the plaintiff and the defendant state (for example, a contractual provision); or
2. under an international convention (such as the Hague Service Convention); or

45. 28 U.S.C. § 1330(b) (2010). *Cf.* Chettri v. Nepal Rastra Bank, 834 F.3d 50 (2d Cir. 2016).

46. Implementing regulations can be found at 22 C.F.R. § 93 (2011). *See also* Fed. R. Civ. P. 4(j). On service of process, venue, and removal, see Restatement (Fourth) of Foreign Relations Law § 461 (Am. Law Inst. 2018).

3. if not possible under the first two methods, then the clerk of court may send the summons, complaint, and notice of suit by any form of mail requiring a signed receipt to the relevant foreign ministry; or
4. if service cannot be made under (3) above within thirty days, then at the plaintiff's request, the clerk may send the summons, complaint, and notice of suit to the Department of State for transmission via diplomatic channels.[47]

The third and fourth alternatives require the summons, complaint, and notice of suit to be translated into the foreign state's official language.[48] Service on a foreign state under § 1608(a) has been interpreted to require *strict* adherence to the statutory provisions.[49]

If service of process on a foreign state is made by mail under § 1608(a)(3), the complaint must be sent to the head of the ministry of foreign affairs of the foreign state concerned. Whether § 1608(a)(3) can be satisfied by service of a complaint addressed to the foreign ministry but delivered to the foreign state's embassy in the United States is currently before the U.S. Supreme Court.[50]

47. Service by U.S. diplomatic channels is governed by 22 C.F.R. § 93 (2011). Additional information on service under the FSIA is available on the Department of State's website, http://travel.state.gov/law/judicial/judicial_693.html.

48. 28 U.S.C. § 1608(a)(3) and (4).

49. Kumar v. Republic of Sudan, 880 F.3d 144, 154 (4th Cir. 2018), *petition for cert. docketed,* Mar. 9, 2018; Barot v. Embassy of the Republic of Zambia, 785 F.3d 26 (D.C. Cir. 2015).

50. *Compare* Harrison v. Republic of Sudan, 802 F.3d 399 (2d Cir. 2015), *reh'g denied,* 838 F.3d 86 (2016), *petition for cert. granted,* 138 S. Ct 2621, No. 16-1094 (Jan. 25, 2018), *with Kumar*, 880 F.3d 144 (service on embassy is not sufficient). The executive branch has taken the position that § 1608(a) of the FSIA does not permit service to be made via direct delivery to an embassy. *See* Brief of the United States of America as Amicus Curiae, Republic of Sudan v. Harrison, No. 16-1094, 2018 WL 2357724 (U.S. Sup. Ct. May 22, 2018).

2. Agencies and instrumentalities

By contrast, service of process on agencies and instrumentalities is governed by § 1608(b) and may be made as follows:

1. under any special arrangement between the parties; or
2. by personal delivery to an officer or authorized agent in the United States; or
3. if it cannot be made under (1) or (2) above, then by delivery of a copy of the summons and complaint as directed by letter rogatory, or by any form of mail requiring signed receipt, or "as directed by order of the court consistent with the law of the place where service is to be made."[51]

It should be noted that a number of foreign states do not permit service by mail (including under the Hague Service Convention).[52]

In contrast to the strict compliance required under § 1608(a), *substantial* compliance will generally suffice under § 1608(b) as long as actual notice is achieved.[53]

3. Minimum contacts

Under 28 U.S.C. § 1330(b), personal jurisdiction over a foreign state exists as to every claim for relief over which the district courts have subject-matter jurisdiction under § 1330(a), when service has been properly made under § 1608. Thus, "[n]either compliance with the forum state's long-arm statute nor minimum contacts between the defendant and the forum state are required."[54]

51. 28 U.S.C. § 1608(b).

52. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, *available at* https://www.hcch.net/en/instruments/specialised-sections/service. On service abroad generally, see U.S. Department of State, Judicial Assistance—Service of Process Abroad, at https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html.

53. *See, e.g.,* Kumar v. Republic of Sudan, 880 F.3d 144 (4th Cir. 2018), *petition for cert. filed,* Mar. 9, 2018; Flanagan v. Islamic Republic of Iran, 190 F. Supp. 3d 138 (D.D.C. 2016).

54. Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1553 (11th Cir. 1993).

At the same time, all of the exceptions to immunity do require specific connections to the United States. In this sense, the FSIA has its own internal "long arm" provisions.[55]

In *Republic of Argentina v. Weltover,* the U.S. Supreme Court assumed (without deciding) that foreign states could be "persons" for purposes of jurisdictional due process requirements.[56] Since then, several circuits have held that foreign states are *not* persons within the meaning of the Fifth Amendment and are thus not entitled to due process protections with respect to the requirement for "minimum contacts" with the jurisdiction.[57] As the D.C. Circuit put it, as long as subject-matter jurisdiction exists under the FSIA and service was proper, there is no "need to examine whether [a foreign state defendant] has the minimum contacts that would otherwise be a prerequisite for personal jurisdiction under the Due Process Clause of the Fifth Amendment."[58]

Whether the same conclusion applies to "agencies and instrumentalities" appears to remain a debated issue. On the one hand, since the term "state" includes the state's agencies and instrumentalities, the statutory logic would suggest that a separate corporation that meets the

55. *See generally* Restatement (Fourth) of Foreign Relations Law § 454, cmt.(f) and Reporters' Note 9 (Am. Law Inst. 2018).

56. 504 U.S. 607, 619 (1992). It has long been clear that the word "person" in the context of Fifth Amendment due process does not include states of the Union. State of South Carolina v. Katzenbach, 383 U.S. 301 (1966). At the same time, it is axiomatic that all parties to litigation in U.S. courts (including foreign states) are entitled to procedural due process.

57. *See* Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393, 399–400 (2d Cir. 2009); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 95–100 (D.C. Cir. 2002); *cf.* Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017); Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion, 832 F.3d 92 (2d Cir. 2016), *cert. dismissed*, 137 S. Ct. 1622 (2017); McEachern v. Inter-Country Adoption Bd., 62 F. Supp. 3d 187 (D. Mass. 2014). *See also* Brief of United States as Amicus Curiae, Sokolow v. Palestine Liberation Org., No. 16-1071, 2018 WL 1256160 (Feb. 22, 2018).

58. I.T. Consultants, Inc. v. Islamic Republic of Pakistan, 351 F.3d 1184, 1191 (D.C. Cir. 2003).

definition is not entitled to the "minimum contacts" requirements of the Due Process Clause for jurisdictional purposes.[59]

On the other hand, for some courts, the question appears to turn on whether the state exercised sufficient or "plenary" control over the entity in question to make it an "agent of the [s]tate."[60] In *TMR Energy Ltd. v. State Property Fund of Ukraine,* for example, the court found that the State of Ukraine had "plenary control" over the State Property Fund (SPF) of Ukraine because the regulations creating the SPF stated that "[t]he [SPF] is a body of the State which implements national policies in the area of privatization" and "[i]n the course of its activities, the [SPF] shall be subordinated and accountable to the Supreme Rada The activities of the [SPF] shall be governed by the Constitution and legislative acts of Ukraine, the Cabinet of Ministers of Ukraine and these Regulations."[61]

C. Venue

Venue is governed by 28 U.S.C. § 1391(f), which provides that civil actions against a "foreign state" may be brought

> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

59. *Corporacion Mexicana De Mantenimiento Integral*, 832 F.3d 92.

60. BCB Holdings Ltd. v. Government of Belize, 232 F. Supp. 3d 28, 44 (D.D.C. 2017) (finding foreign sovereigns and their extensively controlled instrumentalities are not "persons" under the Fifth Amendment's Due Process Clause and citing GSS Group Ltd. v. National Port Auth., 680 F.3d 805 (D.C. Cir. 2014)); *see also* Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 71 n.13 (D.D.C. 2010).

61. 411 F.3d 296, 301–02 (D.C. Cir. 2005) (*cited in* Shoham v. Islamic Republic of Iran, Civil No. 12-cv-508 (RCC), 2017 WL 2399454 (D.D.C. June 1, 2017)).

> (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.[62]

Accordingly, foreign states are most frequently sued in the District of Columbia regardless of where the claim arose.

A number of courts have considered motions to dismiss FSIA suits under the *forum non conveniens* doctrine, typically when the defendant state or entity argues that its own courts offer a more appropriate locus for adjudication.[63]

Few FSIA cases are filed in state courts. Notably, 28 U.S.C. § 1441(d) gives foreign states (and their agencies and instrumentalities) the right to remove to federal court any action filed against them in a state court. Removal is to the district court "for the district and division embracing the place where such action is pending."[64] If the petitioner does not qualify as a "foreign state," the federal court may order the case remanded. Such orders are subject to substantially limited appellate review under 28 U.S.C. § 1447(d).[65]

D. Applicable Law

An action against a foreign sovereign arises under federal law for purposes of Article III jurisdiction.[66] Jurisdiction and procedure are governed by the FSIA. However, for most purposes, the statute itself does not supply the substantive law but instead provides, in 28 U.S.C. § 1606, that where no immunity exists, foreign states "shall be liable in

62. 28 U.S.C. § 1391(f), *discussed in* Luxexpress 2016 Corp. v. Government of Ukraine, No. 15-CV-4880 (VSB), 2018 WL 1626143 (S.D.N.Y. Mar. 30, 2018), and *Corporacion Mexicana De Mantenimiento Integral*, 832 F.3d 92.

63. *See, e.g.,* Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (D.D.C. 2018); Balkan Energy Ltd. v. Republic of Ghana, 302 F. Supp. 3d 144 (D.D.C. 2018); Tatneft v. Ukraine, 301 F. Supp. 3d 175 (D.D.C. 2018). *See also* Brief of the U.S. as Amicus Curiae, Simon v. Republic of Hungary, 2018 WL 2461996 (June 1, 2018) (expropriation exception).

64. 28 U.S.C. § 1441(d) (2010). *See* Smith v. Overseas Korean Cultural Heritage Found., 279 F. Supp. 3d 293 (D.D.C. 2018); Lindsay v. Ports Am. Gulfport, Inc., Civil Action No. 16-3054, 2016 WL 3765459 (E.D. La. July 14, 2016).

65. *Cf.* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 237 (2007).

66. Verlinden B.V. v. Central Bank of Nigeria**,** 461 U.S. 480 (1983).

the same manner and to the same extent as a private individual under like circumstances."

Thus, state substantive law is controlling on most issues of liability in FSIA cases.[67] The exceptions are in the areas of expropriations (under § 1605(a)(3), a court must determine whether the "taking" occurred in violation of international law) and state-sponsored terrorism (under current § 1605A, the statute provides a federal cause of action, but state law will also be relevant).[68]

However, the circuits have split on the question of which choice-of-law rule should be used by federal courts in deciding which substantive state law to apply in a suit under the FSIA. The Ninth Circuit applies the federal rule,[69] while the Second, Fifth, Sixth, and Seventh Circuits have applied the choice-of-law rule of the state in which the federal court sits.[70]

67. *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 620, 622 n.11 (1983) [*Bancec*] ("The Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. . . . [W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances.").

68. See the discussions of §§ 1605(a)(3) and 1605A in Parts V.C, V.F, and VII *infra.* In reference to international law generally, see *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.,* 179 F.3d 1279, 1294–95 (11th Cir. 1999): "We may look to international law as a guide to the meaning of the FSIA's provisions. We find the FSIA particularly amenable to interpretation in light of the law of nations for two reasons. First, Congress intended international law to inform the courts in their reading of the statute's provisions. . . . Second, the FSIA's purposes included 'promot[ing] harmonious international relations. . . .'" The United Nations has adopted a convention incorporating the "restrictive" view of sovereign immunity, but the treaty is not yet in force (and the United States has not yet signed, much less ratified it). *See* United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

69. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 1992 (May 14, 2018).

70. *See* Baylay v. Etihad Airways P.J.S.C., 881 F.3d 1032 (7th Cir. 2018), *cert. denied,* 139 S. Ct. 175 (2018); Atlantica Holdings v. Sovereign Wealth Fund

E. Procedural and Evidentiary Issues

Because the issue is jurisdictional, a federal court must always inquire at the outset whether the defendant is entitled to immunity.[71] In most cases, the issue will arise on motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), although sometimes it may be dealt with under Federal Rule of Civil Procedure 12(b)(6) as a failure to state a claim upon which relief can be granted. It may also be presented on motion for summary judgment under Federal Rule of Civil Procedure 56, on the basis that no genuine dispute exists as to any material fact and the movant is entitled to judgment as a matter of law.

A defendant moving for dismissal for lack of subject-matter jurisdiction must present a prima facie case that it is a foreign state as that term is defined by the statute. Once the defendant establishes that prima facie case, the burden shifts to the plaintiff to show that one of the exceptions articulated in the FSIA applies. Nevertheless, the defendant retains the ultimate burden of persuasion to demonstrate, by a preponderance of the evidence, that an exception does not apply.[72]

Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir.), *cert. denied,* 137 S. Ct. 493 (2016); O'Bryan v. Holy See, 556 F.3d 361, 381 (6th Cir. 2009); Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela, 575 F.3d 491, 498 (5th Cir. 2009). *Cf.* Miango v. Democratic Republic of Congo, 288 F. Supp. 3d 117 (D.D.C. 2018); Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22 (D.D.C. 2016).

71. *Verlinden,* 461 U.S. at 493–94 ("At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.").

72. *See, e.g., In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631 (S.D.N.Y. 2018); Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 362 (5th Cir. 2016); DRFP L.L.C. v. Republica Bolivariana de Venezuela, 622 F.3d 513 (6th Cir. 2010); Tatneft v. Ukraine, 301 F. Supp. 3d 175 (D.D.C. 2018); Sukyas v. Romania, No. CV 15-1946 FMO (JCx), 2017 WL 6550588 (C.D. Cal. Sept. 21, 2017); Figueroa v. Ministry of Foreign Affairs of Sweden, 222 F. Supp. 3d 304 (S.D.N.Y. 2016).

As described by the court in *Arch Trading Corp. v. Republic of Ecuador,*[73] questions of subject-matter jurisdiction under the FSIA "are resolved through a three-part burden shifting framework. . . . First, the defendant must make a prima facie showing that it is a foreign state, thereby becoming 'presumptively immune from the jurisdiction of United States courts; unless a specified exception applies.'. . . Next, the plaintiff must 'sufficiently alleg[e] or proffer[] evidence' of a FSIA exception. . . . Finally, if the plaintiff satisfies its burden of production, the defendant bears '[t]he ultimate burden of persuasion by a preponderance of the evidence" that the FSIA exception does not apply.'"

1. Pleading standards

In *Verlinden*, the U.S. Supreme Court held that "[a]t the threshold of every action in a District Court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act."[74] Some lower courts had interpreted this statement to mean that when a plaintiff's substantive claims mirror the relevant statutory standard, the plaintiff must only show that they are "non-frivolous."[75]

In *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*,[76] however, the Court held that, in order to establish jurisdiction under the expropriation exception (§ 1605(a)(3)), a plaintiff "must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)." A "good argument to that effect is not sufficient," it said, and "[t]he nonfrivolous-argument

73. No. 13 cv 4445 (PAC), 2015 WL 3443906, at *2 (S.D.N.Y. May 28, 2015), *aff'd,* 839 F.3d 193 (2d Cir. 2016) (citations omitted); *cf.* Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (D.D.C. 2018).

74. *Verlinden*, 461 U.S. at 493–94.

75. *See, e.g.,* Simon v. Republic of Hungary, 812 F.3d 127, 140–41 (D.C. Cir. 2016); Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 784 F.3d 804, 812 (D.C. Cir. 2015), *vacated and remanded*, 137 S. Ct. 1312 (2017).

76. 137 S. Ct. 1312, 1316 (2017). The decision cited neither *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), nor *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

standard is not consistent with the statute."[77] "[C]onsistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from *suit,* the court should normally resolve . . . factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible."[78]

Narrowly construed, the decision addresses only the expropriation exception, yet the reasoning seems to apply with equal force to the FSIA's other exceptions—at least to the extent that the jurisdictional requirements replicate the underlying substantive (merits) requirements. In *Schermerhorn v. Israel*, for example, the district court distinguished the noncommercial tort exception from the expropriation exception on that basis, noting that under the former, "the merits inquiry does not mirror the jurisdictional standard."[79]

77. *Bolivarian Republic of Venezuela,* 137 S. Ct. at 1316 (a "nonfrivolous, but ultimately incorrect, argument" that property was taken in violation of international law is insufficient to confer jurisdiction). Thus, whether the property in which the party claims to hold rights was "property taken in violation of international law" should be resolved "[a]t the threshold" of the action. *Id.* at 1324. By distinction, a court normally need not resolve, as a jurisdictional matter, questions about whether a party actually held rights in that property; those questions remain for the merits phase.

78. *Id.* at 1317. *Cf.* Brief of the U.S. as Amicus Curiae in Bolivarian Republic of Venezuela, No. 15-423, 2016 WL 4524346 (U.S.) (Appellate Brief) (Aug. 26, 2016).

79. 235 F. Supp. 3d 249, 257 (D.D.C. 2017), *aff'd on other grounds*, 876 F.3d 351 (D.C. Cir. 2017); *cf.* MMA Consultants 1, Inc. v. Republic of Peru, 719 F. App'x 47 (2d Cir. 2017) (commercial activity). *See also* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, No. C-07-5944 JST, ECF Nos. 5183, 5215, 2018 WL 659084 (N.D. Cal. Feb. 1, 2018) (commercial activity and waiver); *In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631 (S.D.N.Y. 2018) (terrorism). The D.C. Circuit had previously embraced the nonfrivolous jurisdictional standard under § 1605A in *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008). In *Shoham v. Islamic Republic of Iran*, No. 12-cv-508 (RCL), 2017 WL 2399454, at *11 n.14 (June 1, 2017), the court distinguished the requirements for "jurisdictional causation" from the requirements to succeed on the merits, noting that the latter could be higher.

2. Jurisdictional discovery

The complaint itself should contain sufficient factual allegations justifying jurisdictional discovery.[80] The court must review those allegations as well as any undisputed facts presented by the parties. While the FSIA aims to protect foreign sovereigns and their agencies and instrumentalities from not only liability but also discovery and other burdens of litigation, limited jurisdictional discovery may be allowed.[81]

The most widely stated standard specifies that discovery must be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination."[82] Absent specific facts providing a "reasonable basis for assuming jurisdiction," jurisdictional discovery may be refused.[83]

Courts generally recognize two competing interests here: on the one hand, allowing plaintiffs sufficient discovery to establish that their causes of action fall within the statutory exceptions to immunity and, on the other hand, protecting the defendants' legitimate claims to immunity, including from discovery. Thus,

80. *See* de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113, 127 (D.D.C. 2011), *aff'd in part,* 714 F.3d 591 (D.C. Cir. 2013) ("To the extent that jurisdiction depends on factual propositions independent of the merits, the plaintiff must, on a challenge by the defendant, present adequate supporting evidence.").

81. Rubin v. Islamic Republic of Iran, 637 F.3d 783, 795 (7th Cir. 2011) ("[I]t is widely recognized that the FSIA's immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery."); Reiss v. Société Centrale du Groupe des Assurance Nationales, 235 F.3d 738, 748 (2d Cir. 2000) ("We think it essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction. The district court should afford broad latitude to both sides in this regard and resolve disputed factual matters by issuing findings of fact."). On discovery in FSIA proceedings, see Restatement (Fourth) of Foreign Relations Law § 462 (Am. Law Inst. 2018).

82. Arch Trading Corp. v. Republic of Ecuador, 839 F.3d 193, 207 (2d Cir. 2016); EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207, 210 (2d Cir. 2012), *aff'd,* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

83. *Cf. In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631, 641 (S.D.N.Y. 2018).

> jurisdictional discovery should be permitted only if it is possible that the plaintiff could demonstrate the requisite jurisdictional facts sufficient to constitute a basis for jurisdiction[,] and it should not be allowed when discovery would be futile [and] . . . only if the plaintiff presents non-conclusory allegations that, if supplemented with additional information, will materially affect the court's analysis with regard to the applicability of the FSIA.[84]

The question whether the FSIA applies to discovery requests directed at non-parties that may be entitled to immunity does not seem to have been resolved definitively. One decision authorized issuance of letters rogatory to a foreign court requesting production of documentary and testimonial evidence from a foreign governmental instrumentality despite the latter's claims of immunity.[85]

Note that § 1605(g) provides special rules regarding discovery requests against the U.S. government in an action filed under the state-sponsored terrorism exception in § 1605A. These rules are discussed in Part VII *infra*. In brief, § 1605(g) requires the court, upon request of the Attorney General, to stay

> any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.[86]

In addition to various time limits and other limitations, § 1605(g)(4) provides that "a stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure."[87]

Post-judgment discovery (in aid of execution) is discussed in section VI.B.4 *infra*.

84. Peterson v. Islamic Republic of Iran, 563 F. Supp. 2d 268, 274 (D.D.C. 2008) (internal quotations and citations omitted). *See also* Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 849 (5th Cir. 2000).

85. Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769 (S.D.N.Y. 2012).

86. 28 U.S.C. § 1605(g) (2010).

87. *Id.*

3. Interpleader

In *Republic of Philippines v. Pimentel,* the U.S. Supreme Court considered the operation of Federal Rule of Civil Procedure 19 in the context of foreign sovereign immunity.[88] Because "[g]iving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine," the Court held that where sovereign immunity has been asserted by parties whose participation is required by Rule 19(a), the entire action must be dismissed unless the sovereign's substantive defenses are frivolous or its interests would not be prejudiced if the litigation proceeded without its participation.[89]

4. Non-jury trial

Under 28 U.S.C. § 1330(a), the district courts have original jurisdiction (without regard to the amount in controversy) over "any nonjury civil action against a foreign state as defined in section 1603(a) . . . as to any claim for relief in personam" for which the foreign state is not entitled to immunity.[90] Under § 1441(d), "[u]pon removal the action shall be tried by the court without jury."[91]

5. Damages

Under 28 U.S.C. § 1606, foreign states themselves are not liable for punitive damages, but this limitation does not apply to agencies and instrumentalities. In addition, a different rule applies under the state-sponsored terrorism exception.[92]

88. 553 U.S. 851 (2008).

89. *Id.* at 866.

90. Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88 (D.D.C. 2017).

91. A waiver of immunity is not a waiver of immunity from trial by jury. *See* Aboeid v. Saudi Arabian Airlines, Inc., No. CV-10-2518 (SJ)(VVP), 2011 WL 2222140, at *3 (E.D.N.Y. June 1, 2011).

92. Section 1605A authorizes the award of punitive damages as well as economic damages, solatium, and compensation for pain and suffering. *See infra* section VII.C.7.

6. Default

Section 1608(e) states that a court may not enter judgment by default against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."[93] Thus, even if a foreign state does not enter an appearance, the court must determine that an exception to immunity applies and that an adequate legal and factual basis exists for the plaintiff's claims.[94] A copy of the proposed default judgment must first be sent to the foreign state in accordance with § 1608(a).[95]

7. Appeal

While denial of a motion to dismiss for lack of personal or subject-matter jurisdiction is generally not subject to interlocutory review, a majority of the circuits have expressly held that denial of a claim of immunity is immediately appealable under the collateral order doctrine in order to prevent parties from having to litigate claims over which the court lacks jurisdiction.[96] An order granting a motion to dismiss on the

93. 28 U.S.C. § 1608(e) (2010). *See* H.R. Rep. No. 94-1487, at 26 (1976) (Section 1608(e) establishes "the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P."). *See also* Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64, 74 (D.D.C. 2017).

94. *See* Restatement (Fourth) of Foreign Relations Law § 463 (Am. Law Inst. 2018).

95. Under § 1608(e), service must be made on all parties, and an opportunity given to respond, before entry of default; service on the state alone is insufficient when an agency or instrumentality is also named. Murphy v. Islamic Republic of Iran, 778 F. Supp. 2d 70 (D.D.C. 2011).

96. *See, e.g.,* De Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017), *petition for cert. docketed* (No. 17-1165); Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 493 (2016); Global Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co., 807 F.3d 806 (6th Cir. 2015); Terenkian v. Republic of Iraq, 694 F.3d 1122 (9th Cir. 2012); Abelesz v. OTP Bank, 692 F.3d 661 (7th Cir. 2012); Hansen v. PT Bank Negara Indonesia (Persero), TBK, 601 F.3d 1059 (10th Cir. 2010). *See also* Brief of the United States as Amicus Curiae Supporting Defendant-Appellants, Licea v. Curacao, Nos. 11-15909, 11-15910, 11-15944, 2012 WL 3264655, at *8–14 (11th Cir. June 21, 2012).

basis of immunity is a final order from which an interlocutory appeal may be taken under the collateral order doctrine under 28 U.S.C. § 1291.[97]

97. Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A., 895 F.3d 194 (2d Cir. 2018); de Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017); Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 362 (5th Cir. 2016).

IV. Entities and Persons Entitled to Immunity

In virtually every litigation under the FSIA, the first issue is whether the entity claiming the protection of the statute qualifies as a "foreign state." In this regard, the statute makes several important definitional distinctions.

Under 28 U.S.C. § 1603(a), the term "foreign state" includes (1) a *political subdivision* of a foreign state and (2) an *agency or instrumentality* of a foreign state. This fundamental distinction is reflected throughout the FSIA and has concrete legal consequences, since the statute provides for differing treatment of the two categories in various ways, including with respect to service of process, venue, punitive damages, execution, and attachment.

In practice, however, the distinction to be made is almost always between a foreign state proper (including its integral governmental components and political subdivisions) and its separate agencies and instrumentalities.

A. Foreign States, Components, and Political Subdivisions

Despite the practical importance of the basic distinction, neither "foreign state" nor "political subdivision" is actually defined by the statute.

1. Foreign state or government

Clearly the FSIA applies to a suit against the sovereign entity itself, whatever it is called (the Commonwealth of W, the Republic of X, the Kingdom of Y, the State of Z, or any other independent country, nation, union, principality, confederation, etc.), as well as to its government (which may be a named defendant even if not a separate juridical entity).[98]

98. Not every entity aspiring to "statehood" qualifies (for example, the "Principality of Seborga"). One possibly useful reference is the CIA's World Factbook, https://www.cia.gov/library/publications/the-world-factbook. The Office of the Legal Adviser at the U.S. Department of State is another. Generally speaking, the term "state," as used in international law, denotes "[a] sovereign independent entit[y] that ha[s] a permanent population, a defined territory, a government, and

Formal diplomatic or political recognition of the foreign state or government by the United States is not a statutory prerequisite. However, in some circumstances, the fact that the U.S. government has given formal recognition to a named defendant as a "foreign state" has been found relevant.[99]

Full membership in the United Nations can also be a reliable indicator that an entity is a foreign state (since the UN Charter provides, in Articles 3 and 4, that membership is open to "states"). However, the fact that an entity has only "observer status" or lesser rights of participation would not necessarily be conclusive proof of lack of "statehood." Some cases require difficult factual determinations.[100]

2. Internal government components

As used in the statute, the term "foreign state" encompasses not only the national government but also internal governmental or administrative units, such as provinces, prefectures and parishes, cantons and counties, governorates, states, autonomous republics or regions, capital districts, territories, dependencies, and possessions. As a matter of international law, such units are a parts of the "state" just as Nevada and the District of Columbia are rightly considered parts of the United States of America. Such entities may or may not have a separate legal personality or status under their own domestic law, but for purposes of the FSIA they are best considered as integral parts of their parent state as a whole. In *Rong v. Liaoning Provincial Government*, for example, the

the capacity to enter into relations with [other] states." Restatement (Fourth) of Foreign Relations Law § 452, cmt. a (Am. Law Inst. 2018).

99. *See, e.g.*, O'Bryan v. Holy See, 556 F.3d 361, 372–73 (6th Cir. 2009).

100. *Cf.* Waldman v. Palestine Liberation Org., 835 F.3d 317, 329 (D.C. Cir. 2016), *cert. denied sub nom*. Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438 (2018) ("[N]either the PLO nor the PLA is recognized by the United States as a sovereign state, and the executive's determination of such a matter is conclusive"; thus, due process principles apply to assertion of personal jurisdiction over them). *See also* Ungar v. Palestine Liberation Org., 402 F.3d 274, 292 (1st Cir. 2005) (same).

defendant ("a sovereign political subdivision of China") was properly treated as the foreign state for FSIA purposes.[101]

3. Government departments and ministries

Main components of a national (or central) government (such as departments or ministries of defense, foreign affairs, finance, commerce, or interior, as well as the armed forces, police, and intelligence services) are also properly considered part of the state itself.[102] The same is true of central banks.[103]

Foreign embassies, consulates, and the permanent missions of member states to the United Nations, the OAS, or other international organizations in the United States will normally be included within the

101. 362 F. Supp. 2d 83 (D.D.C. 2005). The distinctions are sometimes elusive. Consider *Ben-Haim v. Edri,* No. 15-3877 (JLL), 2015 WL 12839772 (D.N.J. Oct. 1, 2015), in which the court determined for purposes of removal that the Administration of the Rabbinical Courts of the State of Israel constituted "an official government agency of the State of Israel" as well as "part of the Israeli Ministry of Justice and the State of Israel's official judicial system."

102. *Cf.* Ministry of Def. & Support for Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 370 (2009) (describing the ministry "for present purposes [as] an inseparable part of the Iranian State"); Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205, 214 (4th Cir. 2011) ("[A] foreign state and its armed forces are not legally separate for jurisdictional purposes"); Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003) (foreign ministry); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 153 (D.C. Cir. 1994) (armed forces); Gomes v. ANGOP, Angola Press Agency, No. 11-CV-0580 (DLI) (JO), 2012 WL 3637453 (E.D.N.Y. Aug. 22, 2012) (ministries); Jerez v. Republic of Cuba, 777 F. Supp. 2d 6, 20 (D.D.C. 2011) (armed forces, ministry of interior). However, the decisions are not uniform. *See, e.g.,* Magness v. Russian Fed'n, 247 F.3d 609, 613 n.7 (5th Cir. 2001) (Russian Ministry of Culture is a "political subdivision" for purposes of service requirements of § 1608). *See generally* Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Fed'n, 361 F.3d 676, 687–90 (2d Cir. 2004).

103. *See, e.g.,* Howland v. Hertz Corp., 431 F. Supp. 2d 1238, 1242 (M.D. Fla. 2006).

definition of "foreign state" because they are integral parts of their governments and typically lack separate legal identities and the capacity to sue or be sued in their own right.[104]

B. Agencies and Instrumentalities

Section 1603(b) does provide a definition of the term "agency or instrumentality of a foreign state"—if not an entirely unambiguous one. The term includes any entity that

1. is a *separate legal person*, corporate or otherwise; and
2. is an organ of a foreign state or political subdivision thereof, *or* a majority of its ownership interest is owned by a foreign state or political subdivision thereof; and
3. is *neither* a citizen of a state of the United States *nor* created under the laws of a third country.[105]

To qualify under this provision, all entities must meet the first and third criteria, as well as one of the two branches of the second criterion ("organ or political subdivision" or "majority of state ownership").[106]

1. Separate legal entity

The FSIA's legislative history clearly reflects that the term "agency or instrumentality" was meant to be interpreted broadly:

> [The] criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name. . . .

104. USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namibia, 681 F.3d 103, 107 (2d Cir. 2012) ("A foreign state's permanent mission to the United Nations is indisputably the 'embodiment' of that state."); Nwoke v. Consulate of Nigeria, No. 17-cv-00140, 2018 WL 1071445 (N.D. Ill. Feb. 27, 2018), *aff'd,* 729 F. App'x 478 (7th Cir. 2018) (citing Gray v. Permanent Mission of the People's Republic of the Congo, 443 F. Supp. 816, 820 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978)).

105. 28 U.S.C. § 1603(b) (2010).

106. *See* EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 639 (9th Cir. 2003).

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.[107]

In this regard, the statute reflects a fundamental policy of respecting the distinction between the state itself and its separate creations or appendages. This policy was elucidated in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,[108] where the U.S. Supreme Court noted Congress's intent that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." It also said:

> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated.[109]

This presumption can be overcome, however, when the state exercises sufficient control over the instrumentality that it can be characterized as the "alter ego" of the state. As stated by the district court in *Seijas v. Republic of Argentina*:

107. H.R. Rep. No. 94-1487, at 15–16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

108. 462 U.S. 611 (1983) (hereinafter *Bancec*), The opinion contains a description of a "typical governmental instrumentality." *Id.* at 626–27.

109. *Id.* at 626. As stated in *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 440 (D.C. Cir. 1990):

> > It is not enough to show that various governmental entities or officials represent a majority of the shareholders or constitute a majority of the board of directors of the applicable agency or instrumentality; in other words, mere involvement by the state in the affairs of an agency or instrumentality does not answer the question whether the agency or instrumentality is controlled by the state for purposes of FSIA.

> The principal-agent exception of *Bancec* has generally been characterized as referring to the question of whether the instrumentality is an "alter ego" of the sovereign. The alter ego relationship may exist if (1) the instrumentality was established to shield the sovereign from liability, (2) the sovereign ignored corporate formalities in running the instrumentality and the sovereign exercised excessive control over the instrumentality, or (3) the sovereign has directed the instrumentality to act on its behalf, and the instrumentality has done so. An alter ego finding is not, however, justified merely because the sovereign wholly owns the instrumentality or exercises its power as a controlling shareholder.[110]

The Court's reasoning in *Bancec* was guided by its understanding of the underlying goal of including agencies or instrumentalities in the FSIA. In so doing, Congress intended primarily to focus on "public commercial enterprises"—such as state trading corporations created for the purpose of doing business on behalf of the state. The different treatment of agencies and instrumentalities (as opposed to the state itself) serves two purposes in this regard: (1) it acknowledges the importance of separate corporate forms (and the need to treat such entities as separate from the government itself), and (2) it permits the judicial resolution of disputes arising from commercial transactions and events for which no immunity is provided.

In *Bancec*, the specific question was whether the separate instrumentality could be held liable (as an "alter ego") for the actions of the foreign state. Bancec had been created as an official, autonomous credit institution for foreign trade, wholly owned by the Cuban government. When it sued in U.S. court to collect on a letter of credit issued in its favor by First National City Bank, the bank counterclaimed and asserted a right to set off the value of its assets in Cuba which had been nationalized by the government. Under the circumstances, the Court held, the presumption of separate status could be overcome.

110. Seijas v. Republic of Argentina, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, at *11 (S.D.N.Y. March 28, 2011), *aff'd*, 502 F. App'x 19 (2d Cir. 2012). The presumption can also be overridden when recognition would work a fraud or injustice. *Bancec,* 462 U.S. 611 at 629. For an extensive discussion of *Bancec* factors, see Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, C.A. No. 17-mc-151-LPS, 2018 WL 3812153 (D. Del. Aug. 10, 2018).

> [W]here a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be liable for the actions of the other. . . . In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." . . . Giving effect to Bancec's separate juridical status . . . would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law.[111]

Courts occasionally confront the reverse situation, that is, whether the acts of the separate entity can be attributed to the state itself. The Ninth Circuit addressed that issue, noting that the presumption of the foreign state's separate juridical status can only be overcome when the complaint alleges "day-to-day, routine involvement" by that state in the separate entity's affairs, or when the presumption would work a fraud or an injustice.[112]

2. Second criterion

As indicated above, to qualify as an agency or instrumentality, the separate legal entity in question must also be either (a) an organ of a foreign state or political subdivision thereof, or (b) an entity a majority of whose ownership interest is owned by a foreign state or political subdivision thereof.

a. State-owned corporations

To take the second (easier and more common) situation first, a foreign corporation incorporated in, and at least 50% owned by, a foreign state (or a political subdivision of that state) will typically qualify as an "agency or instrumentality" under the second criterion of § 1603(b). The drafters of the statute specifically had in mind state trading corporations, but state-owned commercial banks are another (increasingly

111. *Bancec*, 462 U.S. at 629, 632.

112. *See* Sachs v. Republic of Austria, 695 F.3d 1021 (9th Cir. 2012), *rev'd on other grounds*, OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

common) example.[113] Of course, as explained below, to the extent that its activities fall within the "commercial activity" exception, the corporation will not enjoy immunity.

b. Tiering

In certain fields, the question of separate entities arises in the context of complex organizational structures involving a series of holding companies and subsidiaries. Under *Dole Food Co. v. Patrickson*, an entity qualifies under the majority ownership clause of § 1603(b)(2) only if the foreign state (or political subdivision) itself directly owns a majority of the entity's shares ("one tier only").[114]

The reasoning is that a corporation and its shareholders are distinct entities, and therefore "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary."[115]

Thus, an entity wholly owned by a corporate parent, which is in turn wholly owned by the sovereign, is not entitled to benefit from that sovereign's immunity. (*Dole* also held that the entity's status must be determined as of the time the complaint is filed, not when the alleged tort or other actionable conduct occurred.[116])

In some situations, the separate entity in question may be majority-owned by more than one foreign state. Such "pooled entities" may meet the definition of "agency or instrumentality" under § 1603(b)(2).[117]

113. *See, e.g.,* Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank, Ltd., No. 11 Civ. 0955 (PGG), 2011 WL 6187077 (S.D.N.Y. Nov. 28, 2011).

114. 538 U.S. 468, 477 (2003).

115. *Id.* at 475.

116. *Id.* at 479–80.

117. *See* LeDonne v. Gulf Air, Inc., 700 F. Supp. 1400 (E.D. Va. 1988); *cf.* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds,* 136 S. Ct. 2090 (2016).

c. *Organs or political subdivisions*

In practice, the more difficult task has been applying the first branch of the second criterion of the definition of "agency or instrumentality"—that is, determining whether a particular defendant is properly considered an *organ* of a foreign state or a distinct *political subdivision* thereof when it is a separate entity but not one in which the government has a majority ownership interest.

The distinction arose from a recognition that not all "public commercial enterprises" created by foreign governments take independent corporate form as understood in U.S. law. The point was that a noncorporate structure—one as to which the notion of "ownership interest" was inapposite—could still fall within the meaning of "agency or instrumentality" if it met the separate entity and nationality criteria.

Organ. Again, unfortunately, the term "organ of a foreign state" is not defined by the statute. Clearly, an entity that is a "separate legal person" may be an "organ" and therefore an agency or instrumentality entitled to immunity even if it is neither a corporation nor directly "owned" by a state. To be an "organ" for these purposes, the separate entity must have a clear measure of independence and autonomy from the foreign government.

To determine whether an entity satisfies this definitional test, courts typically examine

- the circumstances surrounding the entity's creation;
- the entity's organizational structure;
- the purpose of its activities;
- the level of government supervision and financial support;
- whether the foreign state requires the hiring of public employees and pays their salaries; and
- the entity's status, obligations, and privileges under state law.[118]

118. *See, e.g.*, CapitalKeys, LLC v. Democratic Rep. of Congo, 278 F. Supp. 3d 265, 282 (D.D.C. 2017) ("the Central Bank may be characterized as an agency or instrumentality of the Congo, as it is evidently a separate legal entity, but acts 'as

Political subdivision. Section 1603(b)(3) covers organizationally separate components of a foreign government's structure that are more properly considered "political subdivisions" than "organs." Like organs, such entities must still have a separate legal identity or "personality" and the capacity to engage in commercial transactions, but they must also function as part of the government structure itself. The difference between the two is admittedly unclear. Moreover, use of the term "political subdivision" here, as part of the definition of "agency and instrumentality," as well as part of the definition of "foreign state" itself in § 1603(a), has understandably led to a certain amount of confusion.[119]

Core functions. More generally, the predominant mechanism for making the broad distinction between "foreign state" and "agency or instrumentality" has been the so-called "core functions" test. The test was initially developed with regard to the service provisions of § 1608, not the distinctions in § 1603.[120] However, the test has subsequently been applied in additional contexts.

the agent and alter ego of Congo,' thus arguably qualifying as an organ of the foreign state"); Kirschenbaum v. 650 Fifth Ave. & Related Props., 830 F.3d 107 (2d Cir. 2016), *cert. denied sub nom.* Alavi Found. v. Kirschenbaum, 137 S. Ct. 1332 (2017). For a discussion of the various balancing approaches to the question, see Restatement (Fourth) of Foreign Relations Law § 452, Reporters' Note 5 (Am. Law Inst. 2018).

119. The court in *California Department of Water Resources v. Powerex Corp.,* 533 F.3d 1087, 1098 (9th Cir. 2008), reexamined the distinction between "organ" and "political subdivision" for purposes of § 1603(b). Citing *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd on other grounds,* 538 U.S. 468 (2003), the court held that an entity is an organ of a foreign state (or political subdivision thereof) if it "engages in a public activity on behalf of the foreign government." The fact that Powerex was a "second tier" subsidiary of the provisional government was not dispositive of the question whether it qualified as an "organ," the court said, so that "[t]here is no reason to think Congress cared about the manner in which foreign states interacted with their organs—i.e., whether the foreign state supervises the organ directly, or through an incorporated agent." 533 F.3d at 1101.

120. In *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 151 (D.C. Cir. 1994), the D.C. Circuit had to decide whether the Bolivian Air Force was a

In *Garb v. Republic of Poland,* for example, the Second Circuit referred to the core functions test in determining, for purposes of the "takings" exception, that Poland's Ministry of the Treasury is "an integral part of Poland's political structure" and not an agency or instrumentality.[121] Similarly, in the D.C. Circuit, an entity that is an "integral part" of a foreign state's political structure is treated as the state itself, but an entity that is commercial in its structure and "core functions" is treated as an "agency or instrumentality."[122]

Agents. Although not expressly addressed in the statute itself, agents of foreign governments may also be covered. For example, in *Phaneuf v. Republic of Indonesia,* the Ninth Circuit held that, in order to invoke the commercial activity exception, a government's agent must have acted with actual authority.[123] The Fourth Circuit concurred in *Velasco v. Government of Indonesia,* stating that "[w]hether a third party reasonably perceives that the sovereign has empowered its agent to engage in a transaction . . . is irrelevant if the sovereign's constitution

"foreign state" or an "agency or instrumentality" for purposes of § 1608. Rather than relying on the specific factors listed in the legislative history cited above (e.g., could the entity sue and be sued in its own name, contract in its own name, or hold property in its own name, under its own law), the court considered "whether the core functions of the foreign entity are predominantly governmental or commercial." *Id.* at 151–52. *See also* Magness v. Russian Fed'n, 247 F.3d 609, 613 n.7 (5th Cir. 2001) ("Whether an entity is a 'separate legal person' depends upon the nature of its 'core functions—governmental vs. commercial'—and whether the entity is treated as a separate legal entity under the laws of the foreign state.").

121. 440 F.3d 579, 594–95 (2d Cir. 2006) (finding the ministry's "*core function*—to hold and administer the property of the Polish state—was indisputably governmental"). In *Servaas Inc. v. Republic of Iraq*, 653 F. App'x 22, 24 (2d Cir. 2011), the Second Circuit noted that "the *Bancec* presumption of separateness does not apply where the instrumentality exists as a political organ of the state, such that 'no meaningful legal distinction' can be drawn between the two." (citing Garb v. Republic of Poland, 440 F.3d 579, 592 (2d Cir. 2006).

122. TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296, 300 (D.C. Cir. 2005). *See also* Restatement (Fourth) of Foreign Relations Law § 452, Reporters' Note 4 (Am. Law Inst. 2018).

123. 106 F.3d 302, 308 (9th Cir. 1997); *see also* EduMoz, LLC v. Republic of Mozambique, 686 F. App'x 486 (9th Cir. 2017).

or laws proscribe or do not authorize the agent's conduct and the third party fails to make a proper inquiry."[124]

As they have in the domestic context, courts have acknowledged that holding private agents liable for carrying out the direction of foreign sovereigns might, in some circumstances, directly impede the completion of legitimate governmental work.[125]

3. Non-U.S. nationality

Determining that the entity in question is neither a citizen of a state of the United States nor created under the laws of a third country ordinarily presents no difficulties. Generally speaking, for purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.[126]

C. Individual Foreign Officials and Agents

For some years, courts debated whether the FSIA should apply to claims against individual foreign government officials for actions taken in their official capacities on behalf of foreign states. A majority of circuits said yes, following the so-called *Chuidian* doctrine, which treated individual officials as "agencies or instrumentalities" for FSIA purposes; other circuits held the opposite.[127]

124. 370 F.3d 392, 410 (4th Cir. 2004). *See also* SACE S.p.A. v. Republic of Paraguay, 243 F. Supp. 3d 21 (D.D.C. 2017).

125. *E.g.,* Salman v. Saudi Arabian Cultural Mission, No. 1:16cv1033 (JCC IDD), 2017 WL 176576 (E.D. Va. Jan. 17, 2017); Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (a private security company hired by a foreign government was entitled to derivative immunity under the FSIA).

126. Rowell v. Franconia Minerals Corp., 706 F. Supp. 2d 891, 895 (N.D. Ill. 2010) (citing Restatement (Third) of Foreign Relations Law § 213 (Am. Law Inst. 1986)).

127. In *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), the appellate court held that FSIA immunity extends to individual officials of foreign states acting in their official capacity, since these officials are properly considered "agenc[ies] or instrumentalit[ies]" of the state and accordingly are protected by the FSIA. *See, e.g., In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010); Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008); Keller v. Central Bank of Nigeria, 277

In 2010, the U.S. Supreme Court resolved the issue in favor of the minority view, rejecting the *Chuidian* doctrine and holding in *Samantar v. Yousuf* that an individual foreign official sued for conduct undertaken in his or her personal capacity is not a "foreign state" entitled to immunity from suit within the meaning of the FSIA.[128] The Court found nothing in the text or legislative history of the statute to suggest that the term "foreign state" should be read to include an official acting on the state's behalf, nor any reason to presume that when Congress codified state immunity, it also intended to codify the immunity of individual foreign government officials.

The Court took care, however, to note that a suit against such an official may nonetheless be precluded by common-law principles of foreign sovereign immunity, following the practice that had governed the immunity of individual foreign government officials prior to 1976.[129] Accordingly, it remanded the suit for a determination whether Samantar might be entitled to such immunity or have other valid defenses.[130] The common-law doctrine of "foreign official immunity,"

F.3d 811 (6th Cir. 2002); Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007). The Seventh Circuit explicitly rejected *Chuidian*, noting that "[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms" (Enahoro v. Abubakar, 408 F.3d 877, 881–82 (7th Cir. 2005)), and the Fourth Circuit concluded on the basis of the FSIA's "language and structure" that it does not apply to "individual foreign government agents." Yousuf v. Samantar, 552 F.3d 371, 381 (4th Cir. 2009).

128. 560 U.S. 305, 130 S. Ct. 2278 (2010).

129. *Id.* at 325.

130. *Id.* "[N]ot every suit can successfully be pleaded against an individual official alone. Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has 'an interest relating to the subject of the action' and 'disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest." *Id.* at 324–25. On remand, the Fourth Circuit determined that the district court had properly deferred to the State Department's position

which covers foreign government officials for conduct undertaken in the exercise of their official duties, has since been addressed in several decisions.[131]

that Samantar was not entitled to head of state immunity and that he was not entitled to immunity for *jus cogens* violations. Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012).

131. *See, e.g.,* Lewis v. Mutond, 258 F. Supp. 3d 168 (D.D.C. 2017) (defendants' actions were carried out in their official capacities so that exercising jurisdiction would have effect of enforcing a rule of law against the foreign sovereign); Nnaka v. Federal Republic of Nigeria, 238 F. Supp. 3d 17, 30–31 (D.D.C. 2017) (suit against individuals in their official capacities made Nigeria the real party in interest); Dogan v. Barak, No. 2:15-cv-08130-ODW (GSJx), 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016) (defendant's "irrefutably 'official public acts' . . . entitle him to immunity" and "there is no jus cogens exception to foreign official immunity" (citing Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009))); Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014) (applying *Matar*); Odhiambo v. Republic of Kenya, 930 F. Supp. 2d 17, 34 (D.D.C. 2013), *aff'd,* 764 F.3d 31 (D.C. Cir. 2014), *cert. denied,* 136 S. Ct. 2504 (2016) (suit governed by the FSIA because it is "in all respects a suit against the Kenyan government").

V. Exceptions to Immunity

The FSIA creates nine distinct and independent categories of exceptions to immunity from jurisdiction. Six of them are found in 28 U.S.C. § 1605(a), as amended: (1) waiver, (2) commercial activity, (3) expropriations, (4) rights in certain kinds of property in the United States,[132] (5) noncommercial torts, and (6) enforcement of arbitral agreements and awards. The seventh category involves cases arising from certain acts of state-sponsored terrorism; formerly covered in § 1605(a)(7), this exception is now codified separately at § 1605A.[133] The eighth category involves maritime liens and preferred mortgages and is dealt with in § 1605(b), (c), and (d). Counterclaims under § 1607 constitute the ninth category.[134]

The most commonly invoked exceptions are waiver, commercial activity, expropriations, noncommercial torts, enforcement of arbitral awards, and acts of state-sponsored terrorism. These exceptions are addressed briefly in this part, and citations are provided to facilitate further research as needed.

It is worth emphasizing that "[a]t the threshold of every action in a District Court against a foreign state . . . the court must satisfy itself that one of the exceptions applies."[135]

132. While the "immovable property" exception in § 1605(a)(4) is infrequently invoked, it was interpreted by the U.S. Supreme Court to include an action to establish the validity of a tax lien. *See* Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007).

133. The terrorism exception is discussed in Part VII *infra*.

134. Section 1607 provides that a foreign state "shall not be accorded immunity with respect to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

135. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 483 (1983).

A. Waiver

Section 1605(a)(1) provides an exception to immunity when the foreign state has waived its immunity "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."[136] Like the other exceptions, this provision operates to limit the statutory grant of federal question jurisdiction under § 1330.[137]

1. Express waivers

Express (or explicit) waivers are typically found in contractual provisions, although they could arise from independent statements (for example, by a duly authorized governmental official). Express waivers must be clear, complete, and unambiguous, and they are normally construed narrowly by U.S. courts in favor of the sovereign.[138] In some situations, relevant treaty provisions may also qualify, although the U.S. Supreme Court cautioned in *Argentine Republic v. Amerada Hess Shipping Corp.* that federal courts should not lightly imply a waiver based upon ambiguous treaty language.[139]

136. 28 U.S.C. § 1605(a)(1) (2010).

137. *See* Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 942 n.4 (D.C. Cir. 2008); *see generally* Restatement (Fourth) of Foreign Relations Law § 453 (Am. Law Inst. 2018).

138. BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin., 884 F.3d 463 (4th Cir. 2018), *cert. denied*, No. 18-19, 2018 WL 3241795 (U.S. Sup. Ct. Oct. 1, 2018); GDG Acquisitions LLC v. Government of Belize, 849 F.3d 1299 (11th Cir. 2017) (government ratification of contractual waiver); Williams v. National Gallery of Art, London, No. 16-CV-6978 (VEC), 2017 WL 4221084 (S.D.N.Y. Sept. 21, 2017), *aff'd on other grounds,* No. 17-3253-cv, 2018 WL 4293327 (2d Cir. Sept. 10, 2018).

139. 488 U.S. 428, 442 (1989). *See also* Odhiambo v. Republic of Kenya, 764 F.3d 31 (D.C. Cir. 2014) (accession to 1951 Convention Relating to the Status of Refugees was not waiver); Carpenter v. Republic of Chile, 610 F.3d 776, 779 (2d Cir. 2010) (waiver by treaty must be "clear and unambiguous" and treaty adherence did not qualify).

2. Implied waivers

As a rule, courts are even more reluctant to find implied waivers of sovereign immunity, requiring strong evidence of the foreign state's intent to subject itself to the jurisdiction of U.S. courts.[140] As noted in *In re Republic of the Philippines*,[141] implied waivers have in practice been found only when (1) a foreign state has agreed to arbitration in the United States,[142] (2) a foreign state has agreed that a contract is governed by U.S. law,[143] or (3) a foreign state has filed a responsive pleading in a case in U.S. courts without raising the defense of sovereign immunity.[144]

A recent decision in the Southern District of New York is illustrative.[145] In that case, SI Group, an Israeli company, entered into a series of waste disposal contracts with a component of the Ukrainian government (DFIC), providing that all disputes would be resolved "in court under the laws of Ukraine" and "[a]ll disputes meant to be settled in court shall be settled at the location of the Client" (meaning the Ivano-Frankivsk State in Ukraine). After a dispute arose over payments, SI

140. *Cf.* Barapind v. Government of Republic of India, 844 F.3d 824 (9th Cir. 2016); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).

141. 309 F.3d 1143, 1151 (9th Cir. 2002).

142. Af-Cap Inc. v. Republic of Congo, 462 F.3d 417 (5th Cir. 2006). Since 2008, the lack of immunity resulting from agreements to arbitrate is no longer a matter of "waiver" but is separately addressed in § 1605(a)(6); see *infra* Part V.E.

143. *See* World Wide Demil, L.L.C. v. Nammo, A.S., 51 F. App'x 403, 405 (4th Cir. 2002); Phoenix Consulting, Inc. v. Republic of Angola, 35 F. Supp. 2d 14, 19 (D.D.C. 1999).

144. *See, e.g.,* BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin., 884 F.3d 463, 474 (4th Cir. 2018) (responsive pleading). While the test is often phrased to encompass agreements to arbitrate in a "foreign" country or to apply "foreign" law, courts properly require evidence of the state's intent to subject itself to U.S. law and U.S. jurisdiction. For purposes of the waiver exception, a motion to dismiss or to compel discovery is not typically considered a responsive pleading.

145. SI Group Consort Ltd. v. Ukraine, Ivano-Frankivsk State Admin., No. 15 CV 3047-LTS, 2017 WL 398400 (S.D.N.Y. Jan. 30, 2017).

Group sued DFIC in Ukrainian court and prevailed. The judgment was affirmed on appeal but was never paid.

SI Group then sued in U.S. court to enforce its judgment against the defendants' assets in the United States, claiming that DFIC had implicitly waived its immunity by consenting broadly to resolve disputes "in court." Noting that the waiver exception "must be construed narrowly," the court rejected that argument. Consent to resolve suits "in court under the laws of Ukraine," it said, does not evidence an implied intent to waive sovereign immunity from suit in U.S. courts. Under § 1605(a)(1), a waiver need not contain an explicit reference to the United States but must evidence "an intent to waive sovereign immunity *in United States courts*." Such an intent could not be inferred from either the relevant contractual language or the defendants' consent to (and participation in) the Ukrainian litigation.[146]

Generally speaking, a foreign state's initiating litigation (filing a suit) in U.S. court will be treated as an implied waiver of its immunity with respect to the subject matter of that litigation.

Suits alleging implicit waiver by a foreign government's conduct in violation of the norms of international law (including acts alleged to be contrary to *jus cogens*, such as torture or genocide) have not been successful.[147]

Even where they are clearly established, waivers of immunity from jurisdiction to adjudicate are not considered waivers of immunity from enforcement of a resulting judgment.

B. Commercial Activity

The "commercial activity" exception in § 1605(a)(2) lies at the heart of the restrictive theory of immunity, and not surprisingly, it is the most

146. The court also rejected the argument that DFIC's consent to arbitrate before the International Centre for Settlement of Investment Disputes under the Ukraine-Israel bilateral investment treaty evidenced a waiver.

147. *See, e.g.,* Dogan v. Barak, No. 2:15-cv-08130-ODW (GSJx), 2016 WL 6024416, at *10–11 (C.D. Cal. Oct. 13, 2016); Restatement (Fourth) of Foreign Relations Law § 453, Reporters' Note 10 (Am. Law Inst. 2018).

litigated exception. Availability of the exception rests on the answers to several related questions:

1. Does the activity of the state or government in question qualify as a "commercial activity"?
2. Is the plaintiff's specific claim "based upon" that activity (or upon an act in connection with that activity)?
3. Does the activity in question have a sufficient jurisdictional nexus to the United States?

1. Definition of commercial activity

Section 1603(d) defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."[148] It is important to note that the provision also provides that "[t]he commercial character of the activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*" (emphasis added).

This "nature not purpose" criterion is fundamental to the exception. In *Republic of Argentina v. Weltover*, the U.S. Supreme Court stated:

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."[149]

Thus, a state remains immune with respect to its sovereign or public acts (*jure imperii*) but not with respect to its acts that are private or commercial in character (*jure gestionis*).

148. 28 U.S.C. § 1603(d) (2010). *See generally* Restatement (Fourth) of Foreign Relations Law § 454 (Am. Law Inst. 2018).

149. 504 U.S. 607, 614 (1992).

> [A] state engages in commercial activity under the restrictive theory where it exercises "only those powers that can also be exercised by private citizens," as distinct from those "powers peculiar to sovereigns." Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts "in the manner of a private player within" the market.[150]

The phrase "commercial activity" thus refers to "the character of the foreign state's exercise of power" rather than its purpose or its effects.[151]

Applying these criteria in given factual situations has generated a substantial body of case law. A few of the main issues are summarized here.

a. Contracts

A contract between a foreign state and a private party for the purchase and sale of goods and services is presumptively commercial.[152] Even "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods."[153] A motor vehicle lease is a "commercial" activity, even where usage is limited to official business of a foreign government mission to the United Nations.[154] Contracts for legal services have been held to fall

150. Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993).

151. Rong v. Liaoning Provincial Gov't, 452 F.3d 883, 888 (D.C. Cir. 2006). "[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce'. . . ." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992).

152. *See* Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1549 (D.C. Cir. 1987).

153. *Weltover,* 504 U.S. at 614–15. *See also* Rote v. Zel Custom Mfg. LLC, 816 F.3d 383 (9th Cir. 2016); Singh v. Singapore Hous. & Dev. Bd., No. 1:15-cv-02240-DAP, 2017 WL 2378120 (N.D. Ohio June 1, 2017).

154. Ford Motor Co. v. Russian Fed'n, No. 09 Civ. 1646 (JGK), 2010 WL 2010867, at *4 (S.D.N.Y. May 10, 2010).

within this exception.[155] Repudiation of a contract is "precisely the type of activity in which a private player in the market engages."[156]

Distinctions are fact-based and sometimes difficult. In *Globe Nuclear Services and Supply GNSS, Ltd. v. AO Techsnabexport*, a Russian company wholly owned by the Russian Federation was not entitled to immunity with respect to its contract to supply an American company with uranium hexafluoride extracted from dismantled nuclear warheads, because the transaction was the type of commerce engaged in by private parties.[157] The court rejected the defendant's argument that it was not merely dealing in uranium but was regulating its supply in a manner that no private party could do.[158]

In *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, a contract for the provision of training and support services to the Royal Saudi Air Force for its fleet of F-5 fighter aircraft (including, for example, flight operations services; training in survival skills; and ejection over sea, desert, or mountain terrain) was deemed noncommercial, while a related contract for repair services, parts, and components for those aircraft was found to fall within the commercial activities exception.[159]

In contrast, a private firm's acts in providing basic health insurance to foreign government workers and monitoring compliance with the governmental mandate under the national social security program were held to be noncommercial.[160]

155. Dentons U.S. LLP v. The Republic of Guinea, 134 F. Supp. 3d 5, 9 (D.D.C. 2015); Embassy of Fed. Republic of Nigeria v. Ugwuonye, 901 F. Supp. 2d 136, 140–41 (D.D.C. 2012).

156. De Csepel v. Republic of Hungary, 714 F.3d 591, 599 (D.C. Cir. 2013).

157. 376 F.3d 282 (4th Cir. 2004). *See also* Guevara v. Republic of Peru, 608 F.3d 1297 (11th Cir. 2010) (offer of reward for information leading to capture of fugitive was commercial activity but not "based upon" commercial activities within the United States).

158. *Globe Nuclear Servs.*, 376 F.3d at 289.

159. 581 F.3d 210 (5th Cir. 2009). *See also* Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159 (11th Cir. 2011) (sunken Spanish naval vessel entitled to immunity despite carrying private cargo).

160. Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamosostek (Persero), 600 F.3d 171 (2d Cir. 2010). *See also* Nwoke v. Consulate of Nigeria, 729 F. App'x 478

In at least some circumstances, defamatory statements can fall within the commercial activity exception if made as part of an effort to collect on a debt.[161]

b. Illegal acts

While a commercial activity (at least for FSIA purposes) is presumptively one in which a private person can engage lawfully, in some situations even illegal or unenforceable contracts may be considered commercial. For instance, criminal acts in the course of business or trade, such as bribery, forgery, or fraud, can constitute commercial activity if they are conduct in which private parties can engage.[162] Money laundering, however, has been held not to fall within the commercial activity exception.[163] As recently stated by one court, "abuses of official power for corrupt ends . . . could not be undertaken by private parties in a marketplace" and therefore cannot fall within the commercial activity exception.[164]

c. Employment contracts

Employment relationships with foreign governments, embassies, missions, or other offices may or may not be considered "commercial," depending on whether the duties in question involve official or "civil service" functions.[165]

(7th Cir. 2018) (issuance of passports not a commercial activity even if state is alleged to have made a profit from fraudulent activity).

161. Batra v. State Bank of India, No. 15 Civ. 2678 (CGS), 2016 WL 3029957 (S.D.N.Y. May 25, 2016).

162. *See, e.g.,* Keller v. Central Bank of Nigeria, 277 F.3d 811, 816 (6th Cir. 2002).

163. *See In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 793 (S.D.N.Y. 2005); Letelier v. Republic of Chile, 748 F.2d 790, 797–98 (2d Cir. 1984) (alleged participation in an assassination is not a lawful activity and therefore not a commercial activity for FSIA purposes).

164. S.K. Innovation, Inc. v. Finpol, 854 F. Supp. 2d 99, 111 (D.D.C. 2012).

165. *See, e.g.*, Salman v. Saudi Arabian Cultural Mission, No. 1:16cv1033 (JCC/IDD), 2017 WL 176576 (E.D. Va. Jan. 17, 2017); Figueroa v. Ministry for Foreign Affairs of Sweden, 222 F. Supp. 3d 304 (S.D.N.Y. 2016); Lasheen v. Embassy of the Arab Republic of Egypt, 485 F. App'x 203 (9th Cir. 2012).

d. Charitable donations

While a charitable intent behind a purchase is irrelevant under the "nature, not purpose" rule, a donation to charity may not be a "commercial activity."[166]

e. Trade promotion

A government's effort to foster or promote trade, commerce, and investment with a particular region within its territory is a "quintessential" government function and therefore not commercial activity.[167]

f. Regulatory or "police powers"

Governmental regulation of the market, licensing the export of natural resources, seizure of goods for law enforcement purposes, and similar exercises of state authority (including eminent domain) are typically found to be noncommercial, since they are not the kinds of actions by which private parties engage in trade, traffic, or commerce.[168] Failure to investigate allegations of fraudulent commercial activity has been held to fall outside this exception.[169]

In *Elbasir v. Kingdom of Saudi Arabia*, the court concluded that a government's provision of health care to its citizens and residents is not a "commercial" activity, but it left open the possibility that promises of financial assistance might be, depending on the specific circumstances.[170]

166. *See In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71 (2d Cir. 2008), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010) (donation to charity not "part of the trade and commerce engaged in by a merchant in the marketplace").

167. El Omari v. Kreab (USA) Inc., 735 F. App'x 30 (2d Cir. 2018); Best Med. Belgium, Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230, 237–38 (E.D. Va. 2012).

168. *See* Chettri v. Nepal Rastra Bank, 834 F.3d 50 (2d Cir. 2016); First Merchants Collection Corp. v. Republic of Argentina, 190 F. Supp. 2d 1336, 1338 (S.D. Fla. 2002); MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326 (9th Cir. 1984).

169. Community Fin. Group, Inc. v. Republic of Kenya, 663 F.3d 977 (8th Cir. 2011).

170. 468 F. Supp. 2d 155, 161–62 (D.D.C. 2007).

Governmental expropriations and nationalizations of private property by foreign governments are presumptively considered non-commercial.[171]

g. Human rights violations and terrorism

Efforts to use the commercial activity exception in § 1605(a)(2) to reach human rights violations and terrorist activities have not been successful.[172]

2. "Based upon"

To fall within § 1605(a)(2), the complaint must be "based upon" a commercial activity.[173] In *Saudi Arabia v. Nelson*, the Supreme Court said that an action is "based upon" the particular conduct that the plaintiff needs to prove in order to satisfy the elements of a claim entitling it to relief under its theory of the case ("something more than a mere connection with, or relation to, commercial activity").[174]

In *OBB Personenverhehr AG v. Sachs*,[175] the Supreme Court clarified that the cause of action must form the "gravamen" of the suit. Mrs. Sachs, a California resident, was seriously injured when she fell under a train in Austria owned by the state-owned railroad. She sued the railroad in U.S. court for breach of a contractual duty of care under the commercial activity exception. She contended that the suit was "based upon" her purchase of a Eurail pass over the Internet from a Massachusetts-based travel agent acting on behalf of the railroad. Relying on *Nelson*, the Court rejected that argument, concluding that her action was

171. *Cf.* Devengoechea v. Bolivarian Republic of Venezuela, 889 F.3d 1213, 1228 (11th Cir. 2018) (expropriation is a uniquely sovereign act, as opposed to a private act"); Garb v. Republic of Poland, 440 F.3d 579, 586 (2d Cir. 2006); Yang Rong v. Liaoning Prov. Gov't, 452 F.3d 883, 889–91 (D.C. Cir. 2006).

172. *See, e.g.,* Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994) (hostage taking for profit did not fall within commercial activity exception).

173. *See* 28 U.S.C. § 1605(a)(2) (exception to immunity for actions "based upon a commercial activity").

174. 507 U.S. 349, 358 (1993).

175. 136 S. Ct. 390 (2015).

"based upon" the railway's alleged negligence in Innsbruck and therefore fell outside the commercial activity exception. "All of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria. . . . Under any theory of the case that Sachs presents, however, there is nothing wrongful about the sale of the Eurail pass standing alone."[176]

Relying on *Sachs*, in *MMA Consultants 1, Inc. v. Republic of Peru*,[177] the Second Circuit described "gravamen" as the "basis" or "foundation" of a claim, meaning "those elements . . . that, if proven, would entitle a plaintiff to relief," thus requiring the court to "zero in" on the core of the suit in order to determine its foundation. In that case, it said the "gravamen" of the suit was the alleged refusal of the government of Peru to pay the principal and interest due on certain bonds. "[W]e do not conduct the gravamen test by engaging in an 'exhaustive claim-by-claim, element-by-element analysis' of a plaintiff's suit. . . . Instead, we ask one simple question: what action of the foreign state 'actually injured' the plaintiff."[178]

3. Jurisdictional nexus

Under § 1605(a)(2), a foreign state is not immune if the action brought against that state is based upon commercial activity having one of three types of connections with the United States:

> (1) A commercial activity carried on in the United States by the foreign state; or
>
> (2) An act performed in the United States in connection with a commercial activity of the foreign state elsewhere (i.e., outside the United States); or
>
> (3) An act outside the United States that was taken in connection with a commercial activity of the foreign state outside of the U.S. and that caused a direct effect in the United States.[179]

176. *Id.* at 396.
177. 719 F. App'x 47, 52 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 85 (2018).
178. *Id.*
179. 28 U.S.C. § 1605(a)(2) (2010).

These three alternatives reflect, in descending order, different degrees of jurisdictional connection to the United States. The Ninth Circuit has distinguished the standards applicable to the three clauses of § 1605(a)(2) as follows: the first entails a "nexus" requirement; the second, a "material connection" requirement; and the third, a "legally significant acts" requirement.[180]

The first clause (commercial activities in the United States) requires the most substantial contacts and would presumptively be satisfied (for example) by import–export transactions involving sales to or purchases from parties in the United States, the negotiation or execution of a loan agreement in the United States, or the receipt of financing from a private or public lending institution located in the United States. At least one court has implied a *de minimis* element ("substantial contact") in this context.[181]

The second alternative contemplates noncommercial acts in the United States that relate to commercial acts abroad. It might be satisfied, therefore, by acts that violate federal securities laws or involve the unlawful discharge of an employee in the United States working on a commercial activity carried on in a third country.

The third alternative, which requires (a) an act outside the United States taken in connection with (b) a foreign state's commercial activity outside the United States that (c) caused a "direct effect" in the United States, has occasioned the most judicial analysis and commentary. In *Republic of Argentina v. Weltover*, the U.S. Supreme Court explained that the required "direct effect" in the United States must follow "as an immediate consequence" of the defendant's activity.[182] However, some

180. Terenkian v. Republic of Iraq, 694 F.3d 1122, 1127 (9th Cir. 2012), *reh'g denied,* 704 F.3d 814 (9th Cir. 2013), *cert. denied sub nom.* Pentonville Developers, Inc. v. Republic of Iraq, 571 U.S. 818 (2013).

181. Under § 1608(e), a "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States. *See* Crystallex Int'l Corp. v. Venezuela, 251 F. Supp. 3d 758 (D. Del. 2017); *cf.* Triple A Int'l, Inc. v. Democratic Republic of the Congo, 721 F.3d 415 (6th Cir. 2013).

182. 504 U.S. 607, 618 (1992). In *Weltover*, the issuance of sovereign bonds and the rescheduling of their repayment by the foreign government were held to

courts have declined to read "direct effect" quite so literally and instead require a "legally significant act" occurring in the United States before a "direct effect" can be found.[183]

Other courts have interpreted the "direct effect" test to require a contractual clause mandating the fulfillment of commercial obligations in the United States.[184] For example, a default by a foreign state, agency, or instrumentality on a contractual obligation to pay in the United States has been held to have a direct effect in the United States.[185] Alleged financial losses suffered in the United States as the result of a failed investment opportunity abroad, a foreign government's default on bonds, or breach of a contract to be performed abroad have been held insufficiently direct to satisfy § 1605(a)(2).[186]

be commercial activities with a direct effect in the United States because payments were due in dollars in New York. The Court rejected "any unexpressed requirement" of foreseeability or substantiality. *See also* Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 363 (5th Cir. 2016) ("no intervening element"); Atlantica Holdings Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98, 108 (2d Cir. 2016).

183. *See* MMA Consultants 1, Inc. v. Republic of Peru, 245 F. Supp. 3d 486 (S.D.N.Y. 2017); Farhang v. Indian Inst. of Tech., Kharagpur, 529 F. App'x 812, 813 (9th Cir. 2013); Kettey v. Saudi Ministry of Educ., 53 F. Supp. 3d 40 (D.D.C. 2014). *Contra* Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 362 (5th Cir. 2016).

184. Atlantic Tele-Network Inc. v. Inter-American Dev. Bank, 251 F. Supp. 2d 126, 134 (D.D.C. 2003). *Cf.* Samco Global Arms, Inc. v. Arita, 395 F.3d 1212 (11th Cir. 2005).

185. *See, e.g.*, Skanga Energy & Marine Ltd. v. Avervenca S.A., 875 F. Supp. 2d 264 (S.D.N.Y. June 21, 2012). In contrast, the "direct effect" requirement has been held unsatisfied in the absence of a contractual requirement for payment to be made in the United States and a provision permitting the holder to designate a place of performance. Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131 (2d Cir. 2012).

186. *See* Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183 (10th Cir. 2008); Can-Am Int'l, LLC v. Republic of Trinidad & Tobago, 169 F. App'x 396 (5th Cir. 2006). In the Second Circuit, "direct effect" is interpreted liberally; *see* Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131, 138–40 (2d Cir. 2012); Securities Investor Prot. v. Bernard L. Madoff Inv. Sec. LLC, 480 B.R. 501, 513 (S.D.N.Y. 2012). However, "the mere fact that a foreign state's commercial

In 2010, the D.C. Circuit held that the alleged breach of a contract to provide cruise ship services in Canada had a direct effect in the United States because

- the plaintiff experienced financial losses caused by the termination of the contract;
- the contract had been negotiated in the United States;
- one of the cruise ships under the contract would have traveled through United States waters;
- the contract's termination resulted in up to $40 million of lost cruise-related business in the United States; and
- contracts related to the terminated contract called for performance in the United States.[187]

The Sixth Circuit has also taken a more liberal approach, holding that because notes issued by a foreign government allowed the holder to demand payment anywhere, the government's failure to pay a demand in Ohio created a "direct effect" in the United States.[188]

The difficulties that can arise in applying this exception are illustrated in two recent decisions. In *Crystallex International Corp. v. Venezuela,*[189] the trial court dismissed the complaint for failure to meet the criteria specified by § 1605(a)(2). The action arose from allegations that Venezuela (through its state-owned oil company PDVSA) had unlawfully expropriated certain mining rights and investments belonging to Crystallex, a Canadian company, and had then orchestrated a scheme in Venezuela to monetize PDVSA's $2.8 billion of American assets and

activity outside the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States." Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 74 (2d Cir. 2010).

187. Cruise Connections Charter 1, LP v. Attorney Gen. of Canada, 600 F.3d 661 (D.C. Cir. 2010).

188. DRFP L.L.C. v. Republica Bolivariana de Venezuela, 622 F.3d 513 (6th Cir. 2010); *but see* Westfield v. Federal Republic of Germany, 633 F.3d 409 (6th Cir. 2011).

189. 251 F. Supp. 3d 758 (D. Del. 2017).

transfer them out of the United States, with the goal of evading potential creditors, including Crystallex.

The court had no difficulty in concluding that the transactions in question constituted "commercial activity" within the FSIA's definition. But it ruled that the complaint failed to satisfy the additional requirements under the exception. Regarding the first clause, the court said that the relevant activity had neither taken place in nor had a "substantial connection to" the United States. The "gravamen" of Crystallex's claim, it said, was PDVSA's "particular act" of directing the transfers with allegedly fraudulent intent. The complaint itself did not specify where that act took place, but since PDVSA itself was located in Venezuela and was not alleged to have any operations in the United States, the court concluded that the alleged fraudulent intent must have been formed and executed in Venezuela. The "substantial connection" requirement also requires some conduct by the foreign nation, instrumentality, or agency in the United States.[190] Mere ownership and control of U.S. subsidiaries, and "overlapping management," cannot suffice for this purpose.

Absent any allegation that PDVSA had performed any act in the United States, the court said, the complaint necessarily failed to satisfy the second clause of the exception (requiring an act performed in the United States "in connection with" commercial activity elsewhere), which is generally understood to apply to noncommercial acts in the United States that relate to commercial acts abroad.

Turning to the third clause of the exception (actions based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" and that act "causes a direct effect in the United States"), the court noted that under *Weltover,* an effect is direct if it follows as an immediate consequence of the defendant's activity. The impact need not be "substantial" or

190. *Id.* at 766–68 (citing, inter alia, Rubin v. Islamic Republic of Iran, 33 F. Supp. 3d 1003, 1009 (N.D. Ill. 2014), and Terenkian v. Republic of Iraq, 694 F.3d 1122, 1132 (9th Cir. 2012)).

"foreseeable," but must have no intervening element, flowing "in a straight line without deviation or interruption."[191]

However, the court said, the complaint alleged only that the transfers in question (while substantial) were undertaken in light of a pending arbitral proceeding in order to hinder Crystallex's ability in the United States to collect on an "anticipated, but [then] non-existent, arbitral award" against Venezuela. Alleged interference with an anticipated arbitral award (or judgment) does not have a "direct effect" in the United States "because neither Venezuela nor PDVSA has any obligation to pay the award or judgment in the United States."[192] None of PDVSA's or its subsidiaries' alleged conduct had a direct, "straight line" impact on Crystallex.[193]

In contrast, consider *Azima v. RAK Investment Authority*,[194] another recent case involving the third clause of the exception. Azima, an American citizen and resident, sued RAKIA, a commercial investment entity that is part of the government of Ras Al Khaimah, one of the emirates in the United Arab Emirates. He claimed that RAKIA had commissioned the repeated surreptitious hacking of his personal and business laptops and then published disparaging material illicitly gleaned from his computers. RAKIA and Azima had an ongoing and active business relationship for many years, and during the relevant period, Azima had worked as a mediator on a dispute between RAKIA and its CEO outside the United States. The allegation was that the hackers repeatedly accessed his business and personal computers in the context of that mediation.

In denying RAKIA's motion to dismiss, the court noted that the phrase "in connection with" as used in § 1605(a)(2) has typically been given a "narrow meaning," requiring some substantive connection or a

191. *Crystallex*, 251 F. Supp. 3d at 770 (citing Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada, 600 F.3d 661, 664 (D.C. Cir. 2010)). *Cf.* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1172 (D.C. Cir. 1994).

192. *Crystallex*, 251 F. Supp. 3d at 771.

193. *Id.*

194. 305 F. Supp. 3d 149 (D.D.C. 2018).

causal link to the commercial activity.[195] Therefore, a tangential or attenuated connection between the act and the commercial activity will not suffice.

Moreover, in the D.C. Circuit, courts apply different tests depending on whether the claims are grounded in contract law or tort law.[196] Because Azima's claims primarily sounded in tort, the court said, the "direct effect" focus must be on "the locus of the tort," that is, "the place where the last event necessary to make an actor liable for an alleged tort takes place."[197] In such cases, the direct-effect question is often whether the plaintiff sustained the cognizable injury in the United States. Even if a court determines that the locus of the tort at issue is the United States, it must also conclude that the effect felt therein was "more than purely trivial."[198]

Because hacking (and the installation of malware) affected the targeted computer systems and because Azima's allegations supported the inference that at least one of his U.S.-based personal and business laptops was in the United States when the hacking occurred, the court concluded that he had sufficiently pled the necessary "direct effect." The court also said that although the loss to an American individual and firm resulting from a foreign tort is not sufficient to cause a direct effect within the United States, the alleged destruction of data on Azima's computers inside the United States was sufficient to support jurisdiction over his conversion claim.[199]

195. *Id.* at 165 (citing Garb v. Republic of Poland, 440 F.3d 579, 587 (2d Cir. 2006)); Adler v. Federal Republic of Nigeria, 107 F.3d 720, 726 (9th Cir. 1997)).

196. Odhiambo v. Republic of Kenya, 764 F.3d 31, 38 (D.C. Cir. 2014) (in contract cases, a court looks to the contract's specified "place of performance"); Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 734 F.3d 1175, 1184 (D.C. Cir. 2013) (explaining that in a tort case, the court determines where the "locus of the tort" occurred).

197. *Azima*, 305 F. Supp. 3d at 167 (citing Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98, 109 (2d Cir. 2016)).

198. *Azima*, 305 F. Supp. 3d at 167 (citing Princz v. Federal Republic of Germany, 26 F.3d 1166, 1172 (D.C. Cir. 1994)).

199. *Azima*, 305 F. Supp. 3d at 169–70.

Accordingly, the court concluded, it was unnecessary to resolve the parties' dispute over the location of the hacking. The text, structure, and purpose of the FSIA's commercial activity exception all point to the conclusion that Congress's primary concern is ensuring that a lawsuit can be maintained if a foreign sovereign acts in a commercial capacity and undertakes a harmful act that occurs in, or impacts, the United States. The exact location of that act is not crucial.[200]

C. Expropriations

Section 1605(a)(3) grants jurisdiction over foreign states in any case "in which rights in property taken in violation of international law are in issue." In addition to these three elements—(1) "rights in property" (2) that have been "taken" and (3) "in violation of international law"—§ 1605(a)(3) imposes a "commercial nexus" requirement (sometimes referred to as the "fourth prong"):

- either the seized property in question (or property exchanged for such property) must be present in the United States in connection with a commercial activity carried on by the foreign state in the United States, or
- if that property (or property exchanged for it) is owned or operated by an agency or instrumentality of the foreign state, that agency or instrumentality must be engaged in commercial activity in the United States.[201]

To invoke this exception, the U.S. Supreme Court has held that a plaintiff must make a "legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)." Neither a "nonfrivolous" assertion nor a "good argument to that effect" suffices.[202]

200. *Id.* at 170–72.

201. 28 U.S.C. § 1605(a)(3) (2010). *See generally* Restatement (Fourth) of Foreign Relations Law § 455 (Am. Law Inst. 2018).

202. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1316 (2017).

The D.C. Circuit has held that the two parts of the "commercial nexus" requirement must be read disjunctively. In other words, jurisdiction over a foreign state under § 1605(a)(3) can be sustained only "if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause."[203] The executive branch appears to agree with this interpretation.[204]

1. Rights in property

The statute itself does not define the term "rights in property." Until recently, most courts had concluded that for purposes of this exception, the alleged "taking" in question must relate to *physical or tangible* property, not the right to receive payment. Thus, bank accounts (as a form of intangible property) were held not to come within the scope of the expropriation exception.[205] However, in *Nemariam v. Federal Democratic Republic of Ethiopia*,[206] the D.C. Circuit noted that neither the text of § 1605(a)(3) nor its legislative history expressly states that the expropriation exception applies only to tangible property. "[T]here

203. De Csepel v. Federal Republic of Hungary, 859 F.3d 1094, 1107 (D.C. Cir. 2017), *petition for cert. docketed,* No. 17-1165 (Feb. 16, 2018); *see also* Phillip v. Federal Republic of Germany, 894 F.3d 406, 414 (D.C. Cir. 2018).

204. *See* Brief for the U.S. as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 15, Kingdom of Spain v. Estate of Cassirer, 564 U.S. 1037 (2011) (No. 10-786); Brief for the U.S. as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 19–21, Rubin v. Islamic Republic of Iran, 137 S. Ct. 2326 (2017) (No. 16-534). *See also* Restatement (Fourth) of Foreign Relations Law § 452, Reporters' Note 9 (Am. Law Inst. 2018).

205. *See generally* Lord Day & Lord v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 560–61 (S.D.N.Y. 2001); Peterson v. Royal Kingdom of Saudi Arabia, 332 F. Supp. 2d 189, 197 (D.D.C. 2004), *aff'd,* 416 F.3d 83 (D.C. Cir. 2005). A claim under § 1605(a)(3) based on the alleged confiscation of shares held in trust was rejected in *Yang Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83, 100–101 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006).

206. 491 F.3d 470 (D.C. Cir. 2007).

seems to us to be no reason to distinguish between tangible and intangible property when the operative phrase is 'rights in property.' We therefore conclude that the expropriation exception applies to the appellants' bank accounts."[207] Some courts have found the term to encompass shareholders' rights.[208]

2. Taken in violation of international law

The term "taken" is also not defined in the FSIA, but the provision was undeniably intended to refer to the nationalization or expropriation of property by a foreign sovereign "without payment of the prompt, adequate and effective compensation [as] required by international law."[209] The reference to takings "in violation of international law" is therefore properly read as a reference to the international law of expropriation and state responsibility, not to other bodies of international law, such as human rights law, nor to alleged violations of customary international law in general.[210]

207. *Id.* at 480. *See also* Abelesz v. Magyai Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).

208. Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 784 F. 3d 804 (D.C. Cir. 2015), *vacated and remanded on other grounds*, 137 S. Ct. 1312 (2017).

209. *See* Chettri v. Nepal Rastra Bank, 834 F.3d 50, 58 (2d Cir. 2016); Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000) ("[T]he legislative history makes clear that the phrase 'taken in violation of international law' refers to 'the nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law,' including 'takings which are arbitrary or discriminatory in nature'" (quoting H.R. Rep. No. 94-1487, at 19 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6004, 6618).

210. On treaty violations, see Kalamazoo Spice Extraction Co. v. Provincial Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984) (alleged violations of a bilateral treaty of friendship, commerce, and navigation); McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485, 491 (D.C. Cir. 2008) (treaty must provide or be intended for judicial enforcement). The court in *McKesson Corp. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (RJL), 2009 WL 4250767, at *3–4 (D.D.C. Nov. 23, 2009), found that the FSIA's commercial activities exception permits an expropriation claim based on customary international law. The U.S. government argued that, to the contrary, the commercial activities exception does

In this context, the term "taking" refers to acts of a sovereign government, not those of private individuals or entities.[211] Moreover, as stated by the U.S. District Court for the District of Columbia, a taking violates international law if "(1) it was not for a public purpose; (2) it was discriminatory; or (3) no just compensation was provided for the property taken."[212]

Judicial administration and sale of a financially struggling company does not constitute a "taking."[213]

The exception has generally been interpreted not to reach a foreign government's taking of its own nationals' property, because international law does not prohibit such takings (under the so-called "domestic takings" rule).[214] However, several courts have recently held that the rule can be overcome when the property was taken in the context of egregious human rights violations (for example, during a genocidal campaign).[215] In the *Restatement (Fourth) of Foreign Relations Law* (Am. Law Inst. 2018), Reporters' Note 6 to section 455 (entitled

not authorize U.S. courts to create a new federal common-law cause of action by looking to customary international law. *See* Brief of the U.S. as Amicus Curiae, McKesson Corp. v. Islamic Republic of Iran, No. 10-7174, 2011 WL 3209069, at *6–15 (D.C. Cir. July 27, 2011).

211. Devengoechea v. Bolivarian Republic of Venezuela, 889 F.3d 1213, 1228 (11th Cir. 2018).

212. De Csepel v. Republic of Hungary, 808 F. Supp. 2d 113, 128 (D.D.C. 2011), *aff'd in part,* 714 F.3d 591 (D.C. Cir. 2013). *See also* Comparelli v. Republica Bolivariana De Venezuela, 891 F.3d 1311, 1326 (11th Cir. 2018).

213. Best Med. Belgium, Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230, 239 (E.D. Va. 2012). Nor does "expropriation to satisfy a debt declared valid by a foreign court." *Id.*

214. Mezerhane v. Republica Bolivariana de Venezuela, 785 F.3d 545, 550 (11th Cir. 2015); *cf.* Restatement (Fourth) of Foreign Relations Law § 455, Reporters' Note 6 (Am. Law Inst. 2018). *See also* Brief of the United States as Amicus Curiae, Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, No. 13-7169, 2018 WL 460639 (Jan. 17, 2018).

215. *E.g.*, Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016). *See also* de Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017), *petition for cert. docketed,* No. 17-1165 (Feb. 21, 2018); Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018).

"Claims Concerning Property Taken in Violation of International Law") expresses some concern about these decisions, noting that

> [b]y eliminating the "domestic takings" rule and permitting claims to proceed on the basis of allegations that the takings occurred in the context of egregious violations of international law, this line of decisions appears to expand the scope of § 1605(a)(3) well beyond the original intent of the Congress, potentially opening courts in the United States to a wide range of property-related claims arising out of foreign internal (as well as international) conflicts characterized by widespread human rights violations.

By distinction, claims under the expropriation exception based solely on alleged violations of human-rights treaties have been rejected.[216]

In contrast to the terrorism provision, § 1605(a)(3) does not textually require a plaintiff to exhaust foreign remedies before bringing a suit against a foreign state or its agency or instrumentality. Such a requirement is generally said to exist in international law before a claim can be asserted at the intergovernment level (or before an international tribunal) by one state (on behalf of its nationals) against another state.[217] Several U.S. courts have suggested that exhaustion of domestic remedies in foreign courts or related procedures might be appropriate under § 1605(a)(3) as a prudential matter.[218] Others have rejected such an approach, as has the executive branch.[219]

216. *See* Mezerhane v. Republica Bolivariana de Venezuela, 785 F.3d 545 (11th Cir. 2015); de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985); *cf.* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 88 (D.C. Cir. 2002) ("The original FSIA was not intended as human rights legislation."). Whether § 1605(a)(3) is limited to takings that result in "economic injuries" was recently examined, inconclusively, by the court in *LaLop v. United States*, 29 F. Supp. 3d 530 (E.D. Pa. 2014).

217. *See* Restatement (Third) of Foreign Relations Law § 713 cmt. f and Reporters' Note 3 (Am. Law Inst. 1987).

218. *See, e.g.,* Fischer v. Magyar Allamvasutak ZRT, 777 F.3d 847, 854 (7th Cir. 2015); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 671–95 (7th Cir. 2012).

219. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1034–37 (2011); Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934 (D.C. Cir. 2008); *cf.* Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016); Brief of the United States as Amicus Curiae, Kingdom of Spain v. Estate of Cassirer, No. 10-786, 2011 WL

In the *Restatement (Fourth) of Foreign Relations Law* (Am. Law Inst. 2018), Reporters' Note 11 to section 455 observes that § 1605(a)(3) contains no requirement that a claimant attempt to exhaust available local remedies before bringing an action against the foreign state under the "expropriation" exception, in contrast to the "opportunity to arbitrate" precondition that was explicitly included in the text of the state-sponsored terrorism exception at §1605A(a)(2)(A)(iii). Noting that in international law, the exhaustion requirement applies by its terms to "international," not domestic, proceedings, the note concluded that "the interpretation of the statute that does not require exhaustion appears to be the proper one. *Cf.* Republic of Argentina v. NML Capital, Inc., 134 S. Ct. 2250, 2256 (2014) ('Any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.'); Simon v. Republic of Hungary, 277 F. Supp. 3d 42 (D.D.C. 2017)."

In a case of first impression, the Ninth Circuit concluded that nothing in the plain language of § 1605(a)(3) requires that the state against which the claim is made be the same state that took property in violation of international law.[220] Thus, a suit could proceed against the Kingdom of Spain for the recovery of a Camille Pissarro painting on display at a museum in Madrid, even though the painting had been taken from the plaintiff's grandmother in violation of international law in 1939 by an agent of the government of Nazi Germany.

3. Commercial nexus

The so-called "fourth prong" of this exception requires (for jurisdictional purposes) a connection between the taking and commercial activity in the United States. As is often the case under the FSIA, standards established for the foreign state differ from those established for

2135028, at *16–17 (U.S. Sup. Ct. on petition for writ of certiorari, May 27, 2011). *See also* Restatement (Fourth) of Foreign Relations Law § 455 Reporters' Note 11 (Am. Law Inst. 2018).

220. Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1057 (9th Cir. 2009), *aff'd in part on reh'g en banc*, 616 F.3d 1019, 1031 (2010), *cert. denied*, 131 S. Ct. 3057 (2011).

its agencies and instrumentalities. If the suit is against the foreign state itself, the seized property in question (or property exchanged for such property) must be present in the United States in connection with a commercial activity carried on by that foreign state in the United States. If the property in question (or property exchanged for it) is owned or operated by an agency or instrumentality of the foreign state, then all that is required is for that agency or instrumentality to be engaged in commercial activity in the United States.[221]

In *de Csepel v. Republic of Hungary*,[222] the D.C. Circuit held that the two standards operate independently of each other, so that under § 1605(a)(3), a foreign state loses its immunity only if its own activities satisfy the requirements of the first clause of the "commercial activity" requirement, and not the commercial activities of its agencies or instrumentalities.

D. Noncommercial Torts in the United States

Under § 1605(a)(5), a foreign state is not immune from suits (not otherwise covered by the commercial activity exception) in which money damages are sought for personal injury or death, or for damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his or her office or employment. Prototypical cases include injuries resulting from an automobile accident involving an embassy vehicle and a "slip and fall" in a foreign consulate.

221. "[U]nder the second clause of the expropriation exception, a plaintiff must show current commercial activity in the United States." Sukyas v. Romania, No. CV 15-1946 FMO (JCx), 2017 WL 6550588, at *5 (C.D. Cal. Sept. 21, 2017).

222. 859 F.3d 1094, 1107 (D.C. Cir. 2017), *petition for cert. docketed*, No. 17-1165, Feb. 21, 2018 (a foreign state retains its immunity unless the first clause of the commercial-activity nexus in § 1605(a)(3) is met). In so ruling, the court followed its prior decision in *Simon v. Republic of Hungary,* 812 F.3d 127 (D.C. Cir. 2016), and distinguished *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

1. Discretionary functions excluded

The noncommercial tort exception does not apply to two important categories of claims, namely those

- "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused"; and
- "arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[223]

2. Not extraterritorial

The exception covers only torts occurring "entirely" within the territorial jurisdiction of the United States.[224] Thus, the exception does not

223. 28 U.S.C. § 1605(a)(5)(A–B) (2010). *See* Nwoke v. Consulate of Nigeria, No. 17-CV-00140, 2018 WL 1071445 (N.D. Ill. Feb. 27, 2018) (passport issuance); Merlini v. Canada, 280 F. Supp. 3d 254 (D. Mass. 2017) (provision of employment benefits); Fagot Rodriquez v. Republic of Costa Rica, 297 F.3d 1, 8 (1st Cir. 2002) (trespass claims based upon exercise or performance of discretionary function); Cabiri v. Government of the Republic of Ghana, 165 F.3d 193 (2d Cir. 1999); *In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 794 (S.D.N.Y. 2005) ("The FSIA's discretionary function exception replicates the discretionary function exception in the Federal Tort Claims Act."). In *Doe v. Holy See*, a complaint alleging injury inflicted by a sexually abusive priest was held not to fall within the commercial activity exception, but it was sufficient to sustain jurisdiction against the Holy See under the tort exception on a theory of *respondeat superior*; the alleged failure to warn parishioners about a known danger did not qualify as the exercise of a discretionary function. 434 F. Supp. 2d 925 (D. Or. 2006), *aff'd in part, rev'd in part,* 557 F.3d 1066 (9th Cir. 2009), *cert. denied sub nom.* Holy See v. Doe, 130 S. Ct. 3497 (mem.) (2010).

224. Section 1603(c) defines "United States" to include "all territory and waters, continental and insular, subject to the jurisdiction of the United States." Vessels flying the American flag are thus excluded. *See* Schermerhorn v. Israel, 876 F.3d 351 (D.C. Cir. 2017).

apply to torts occurring abroad, even if the tort is said to have been partially performed (or to have had an "effect") in the United States.[225] Most courts have concluded that "both the injury and the tortious act or omission must occur in the United States."[226] Claims based on personal injury and death occurring at a U.S. embassy overseas have been held not to fall within § 1605(a)(5).[227]

3. Damages

If the criteria in § 1605(a)(5) are met, ordinary tort law applies to the substantive issues of liability. Under 28 U.S.C. § 1606, "a foreign state is liable in the same manner and to the same extent as a private individual under like circumstances," except that a foreign state "shall not be liable for punitive damages." (Punitive damages are recoverable, however, against an agency or instrumentality, and as noted in Part V.F. *infra*, special rules apply to damages in actions under § 1605A against state sponsors of terrorism.) The statute does not provide a federal standard for assessing liability, so liability must be determined by reference to otherwise applicable tort law.[228]

4. Examples

In *Miango v. Democratic Republic of Congo*,[229] the plaintiffs sought damages against the Democratic Republic of the Congo (and some of its officials) arising from their actions in responding (violently) to a

225. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989) (exception inapplicable when injury occurs outside the United States); *cf.* Schermerhorn v. State of Israel, 876 F.3d 351 (D.C. Cir. 2017).

226. Doe I v. State of Israel, 400 F. Supp. 2d 86, 108 (D.D.C. 2005); O'Bryan v. Holy See, 556 F.3d 361, 382 (6th Cir. 2009); Jerez v. Republic of Cuba, 775 F.3d 419, 424 (D.C. Cir. 2014).

227. Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 174–75 (D.D.C. 2006).

228. *Cf.* Newman v. Republic of Bulgaria, No. 16 Civ. 9268 (JFK), 2017 WL 1655248 (S.D.N.Y. May 2, 2017); Doe v. Holy See, 434 F. Supp. 2d 925, 948 (D. Or. 2006), *aff'd in part, rev'd in part*, 557 F.3d 1066 (9th Cir. 2009), *cert. denied sub nom.* Holy See v. Doe, 130 S. Ct. 3497 (mem.) (2010). *See generally* Restatement (Fourth) of Foreign Relations Law § 457 (Am. Law Inst. 2018).

229. 288 F. Supp. 3d 117 (D.D.C. 2018).

protest against human rights violations committed in the DRC. The protest took place across the street from the Washington, D.C., hotel where then-visiting DRC President Kabila and his delegation were staying. The plaintiffs alleged that they had been physically attacked and beaten by DRC security forces during the protest, and they sought damages for, inter alia, assault, battery, and intentional infliction of emotional distress.

All relevant actions had clearly taken place within the United States, and the district court found that the plaintiffs had provided sufficient evidence to support the conclusion that the security officials had been acting within the scope of their employment when they committed the acts alleged in the complaint (in particular, that the alleged assault took place immediately after the plaintiffs were observed by the DRC President and was carried out by individuals in his entourage).

In ruling on the motion for entry of a default judgment, the court looked to § 1606, and applying the relevant standards of D.C. law, it awarded damages for, inter alia, common-law battery, pain and suffering, and loss of consortium.

In contrast, consider the decision in *Doe v. Federal Democratic Republic of Ethiopia*.[230] In that case, an Ethiopian asylee in the United States (proceeding pseudonymously as "Kidane") alleged that he had been tricked into downloading a program (FinSpy) that recorded the activities of the users of his computer and then communicated with a server in Ethiopia, enabling Ethiopian authorities to spy on him from abroad. The D.C. Circuit upheld the lower court's dismissal of the complaint on the ground that § 1605(a)(5) abrogates sovereign immunity only for a tort occurring entirely in the United States.[231]

The court said that unlike the commercial activity exception, the noncommercial tort exception does not ask where the "gravamen" occurred, only where the "entire tort" occurred. Kidane's claim rested in part on Maryland's tort of "intrusion-upon-seclusion," which requires

230. 851 F.3d 7 (D.C. Cir. 2017).

231. *Id.* at 10–11 (citing, inter alia, Jerez v. Republic of Cuba, 775 F.3d 419, 424 (D.C. Cir. 2014), and distinguishing Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989), and Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980)).

proof of intentional intrusion. The tortious intent aimed at Kidane plainly lay abroad, and the tortious acts of computer programming occurred abroad. Moreover, Ethiopia's placement of the FinSpy virus on Kidane's computer, although completed in the United States when Kidane opened the infected e-mail attachment, began outside the United States. It thus could not be said that the entire tort occurred in the United States.

It is unsurprising, the court observed, that transnational cyber-espionage should lie beyond § 1605(a)(5)'s reach, since "Congress' primary purpose in enacting the exception was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law."[232]

E. Arbitration

Under § 1605(a)(6), which was added to the FSIA in 1988, a foreign state, agency, or instrumentality is not immune from the jurisdiction of U.S. courts in any proceeding to enforce an arbitration agreement made by the foreign state (with or for the benefit of a private party) or to confirm an arbitration award pursuant to such an agreement if the underlying dispute is capable of settlement by arbitration under the laws of the United States and if

> (A) the arbitration takes place, or is intended to take place, in the United States,
>
> (B) the agreement or award is (or may be) governed by a treaty or international agreement in force for the United States which calls for the recognition and enforcement of arbitral awards, or
>
> (C) the underlying claim could have been brought in a U.S. court but for the agreement to arbitrate or if the foreign state has waived its immunity.[233]

Prior to the enactment of this exception, courts typically treated a foreign state's agreement to arbitrate a given dispute (especially one of

232. 851 F.3d at 11 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439–40 (1989)).

233. 28 U.S.C. § 1605(a)(6) (2010). *See also* Restatement (Fourth) of Foreign Relations Law § 458 (Am. Law Inst. 2018).

a clearly commercial nature) as an implicit waiver of immunity with respect to enforcement of the agreement and the resulting award.[234] With the adoption of § 1605(a)(6), the question of waiver no longer arises.

Courts have utilized this section to exercise jurisdiction over foreign states both to enforce arbitration agreements and to recognize and enforce arbitral awards under the U.N. Convention on the Recognition and Enforcement of Arbitral Awards ("New York Convention"),[235] the Inter-American Convention on International Commercial Arbitration ("Panama Convention"),[236] and (more recently) the International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID" or "Washington Convention").[237]

The decision of the D.C. Circuit in *Human v. Czech Republic-Ministry of Health*[238] is illustrative. In that case, the Czech Ministry of Health had entered into a "framework agreement" with Diag Human, a blood plasma technologies and production company organized under the law of Lichtenstein, aimed at ensuring "fractionation products" from frozen human plasma for the Czechoslovak health care system. The Ministry of Health contracted to purchase technical equipment and to provide training for medical personnel to ensure fractionated

234. *E.g.,* Birch Shipping Corp. v. Embassy of United Republic of Tanzania, 507 F. Supp. 311 (D.D.C. 1980).

235. U.N. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, implemented by the Federal Arbitration Act, 9 U.S.C. §§ 201–207 (2010).

236. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975), implemented at 9 U.S.C. §§ 301–307 (2010).

237. International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1291, T.I.A.S. No. 6090. Under 22 U.S.C. § 1650a, ICSID awards are entitled to "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

238. 824 F.3d 131 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1068 (2017).

blood products would be made available to transfusion wards throughout the Czech Republic; in return, Diag Human agreed to accept a share of the total volume of fractionated plasma produced.

Although Diag Human performed its part of the arrangement, disputes arose that it claimed prevented it from continuing to perform. It sued the Ministry of Health in the Prague Commercial Court, but the parties agreed to resolve their dispute in arbitration. The arbitrators decided in favor of Diag Human, awarding more than $325 million for its losses.

Diag Human then sought to enforce that award against the Czech Republic in the United States under the Federal Arbitration Act (FAA), which, inter alia, codifies the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[239] The district court dismissed the case on the basis that (a) the relationship between Diag Human and the Ministry of Health was not "commercial" in nature, as required by the New York Convention, so the convention did not apply, and (b) the Czech Republic had not waived its sovereign immunity under § 1605(a)(1). Although Diag Human had not specifically invoked the arbitration exception under § 1605(a)(6), the trial court found it inapplicable because the arbitration had taken place in the Czech Republic and because the underlying claim could not have been brought in a U.S. court.

The court of appeals reversed, holding that the arbitration exception did apply. The framework agreement, the court said, was sufficiently commercial to satisfy the convention's requirements ("[t]he provision of healthcare technology and medical services has an obvious connection to commerce") and, while "relatively informal," it was also sufficient to satisfy the "defined legal relationship" requirement of the FSIA's arbitration exception.[240] "The FSIA explicitly contemplates that some legal relationships will qualify under § 1605(a)(6) despite not rising to the formality of a contractual arrangement."[241]

239. 9 U.S.C. §§ 201–208, implementing the New York Convention.

240. 824 F.3d at 135, 137.

241. *Id.* at 135. In remanding the case for further proceedings, the court noted that whether the arbitration award was "final" for New York Convention purposes

The Second Circuit recently held that the FSIA provides the exclusive mechanism for the enforcement of ICSID awards against foreign sovereigns in federal court. The court rejected summary ex parte proceedings as incompatible with the FSIA, since they are, by nature, conducted without required service on the foreign state.[242]

Suits to enforce arbitral awards against foreign sovereigns may be subject to dismissal on *forum non conveniens* grounds.[243]

F. State-Sponsored Terrorism

Since 1996, when Congress amended the FSIA to remove the immunity of foreign states for certain acts of state-sponsored terrorism, more and more cases have been brought under this provision. As initially enacted, § 1605(a)(7) provided that immunity did not apply in cases in which money damages were sought for personal injury or death caused by acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources if those acts were taken at a time when the state in question was formally designated as a sponsor of terrorism. That provision was repealed in 2008 and replaced by an even broader exception, now codified at 28 U.S.C. § 1605A.[244] That statute is summarized here; a more detailed discussion is provided

was a merits question that could determine whether the arbitration award can be enforced under the FAA. The district court subsequently dismissed the case on the ground that the arbitration award in fact never became "final" or enforceable. 279 F. Supp. 3d 114 (D.D.C. 2017).

242. Mobil Cerro Negro, Ltd. v. Venezuela, 863 F.3d 96 (2d Cir. 2017); *see also* Micula v. Government of Romania, 714 F. App'x 18 (2d Cir. 2017).

243. *See* Figueiredo Ferraz e Engenharia de Projecto Ltda. v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011). The D.C. Circuit has held otherwise. TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296, 303 (D.C. Cir. 2005); *cf.* Balkan Energy Ltd. v. Republic of Ghana, 302 F. Supp. 3d 144 (D.D.C. 2018); Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (D.D.C. 2018).

244. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083(a) and (b) (2008), 122 Stat. 338, 341 (codified at 28 U.S.C. § 1605A). For a comprehensive review of the 2008 statute, see *In re Islamic Republic of Iran Terrorism Litigation,* 659 F. Supp. 2d 31 (D.D.C. 2009).

in Part VII *infra*, along with a description of a new 2016 amendment known as JASTA and codified in relevant part at § 1605B.

1. Section 1605A

Under the 2008 amendment, a *designated* "state sponsor of terrorism" has no immunity in a case

> in which money damages are sought for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[245]

2. Limitations

As the quoted provision indicates, the exception applies only to actions for money damages arising from specifically enumerated categories of acts that were engaged in by foreign officials, employees, or agents "acting within the scope of [their] office, employment, or agency." In addition, the exception applies only if

1. the foreign state had been formally designated as a state sponsor of terrorism at the time of (or as a result of) the act in question;
2. the claimant or victim was a U.S. national, a member of the armed forces, or an employee or contractor of the United States government acting within the scope of employment; and
3. (when the acts in question occurred in the designated foreign state), that state was given a "reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration."[246]

3. Designated state sponsors

For these purposes, a foreign state must have been formally designated by the Secretary of State as a government that has "repeatedly provided

245. 28 U.S.C. § 1605A(a)(1) (2010).

246. *Id.* § 1605A(a)(2). This section includes additional requirements.

support for acts of international terrorism" pursuant to § 6(j) of the Export Administration Act of 1979,[247] § 620A of the Foreign Assistance Act of 1961,[248] § 40 of the Arms Export Control Act,[249] or any other relevant provision of law. The list of designated state sponsors of terrorism is published officially. As of November 2018, four countries were on the list: Iran, North Korea, Sudan, and Syria.[250]

This exception is examined in greater detail in Part VII *infra*.

247. Initially codified at 50 U.S.C. app. § 2405(j), later transferred to 50 U.S.C. § 4605.

248. 22 U.S.C. § 2371.

249. 22 U.S.C. § 2780.

250. *See* U.S. Department of State, State Sponsors of Terrorism, https://www.state.gov/j/ct/list/c14151.htm. South Yemen was removed from the list in 1990, Iraq in 2004, Libya in 2006, and Cuba in 2015. North Korea was removed in 2008 but relisted in 2017.

VI. Attachment and Execution

In addition to immunity from jurisdiction, the FSIA provides for immunity from both pre-judgment attachment and post-judgment execution.

The general rule under 28 U.S.C. § 1609 is that property of a foreign state or its agencies and instrumentalities that is in the United States is immune from attachment, arrest, and execution except as provided in §§ 1610 and 1611 and as subject to existing international agreements to which the United States was a party at the time the FSIA was enacted.

Thus, even when a valid judgment has been entered against a foreign state, property of that foreign state that is located within the United States remains immune from execution and attachment unless (a) the property meets the "commercial activity" requirements and (b) additional statutory exceptions allowing for execution and attachment against that property are satisfied. Certain categories of property are exempt.

Courts must always satisfy themselves that they have jurisdiction before considering requests for attachment, arrest, execution, or post-judgment discovery, even when the foreign state, agency, or instrumentality fails to appear.[251]

As the Ninth Circuit has held, when a court is asked to attach the property of a foreign state, it must raise and decide the issue of immunity from execution on its own initiative even if the defendant does not appear. The court recognized a statutory presumption in favor of immunity from attachment and execution where it is "apparent from the pleadings or uncontested" that the defendant is a foreign state: "Once

251. Immunity under these provisions has been held to be "an affirmative defense that only the foreign state has standing to invoke." Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549, 555 (N.D. Ill. 2005). *But see* Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229, 233 (5th Cir. 2004) (holding that a garnishee may also raise a sovereign immunity claim under the FSIA). *See generally* Restatement (Fourth) of Foreign Relations Law § 464 (Am. Law Inst. 2018).

the court has determined that the defendant is a foreign state, the burden of production shifts to the plaintiff to offer evidence that an exception applies."[252]

It is important to note that the FSIA provides narrower exceptions to immunity with respect to attachment and execution than it does with respect to jurisdiction.[253] Accordingly, a court may have jurisdiction to decide the case but not to enforce the resulting judgment. In addition, the statute contains more protective rules for foreign states than for their agencies and instrumentalities.

A. Pre-judgment Attachment

Pre-judgment attachment of the property of states or their agencies and instrumentalities for purposes of acquiring jurisdiction is prohibited.

Under § 1610(d)(1), pre-judgment attachment of a foreign state's property is available only for the purpose of securing satisfaction of an eventual judgment, only against property used for a commercial activity in the United States, and only if the foreign state in question has explicitly waived its immunity from such attachment.[254] This provision has been held to prohibit writs of garnishment.[255]

B. Post-judgment Attachment and Execution

Section 1610 sets forth limited exceptions to immunity for attachments in aid of execution and for execution of judgments obtained under the statute against foreign states (under § 1610(a)) and their agencies and

252. Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1125 (9th Cir. 2010); *accord*, Walters v. Industrial & Commercial Bank of China, Ltd., 651 F.3d 280, 290 (2d Cir. 2011).

253. The execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself. *Walters,* 651 F.3d at 289.

254. *See* De Sousa v. Embassy of the Republic of Angola, 229 F. Supp. 3d 23 (D.D.C. 2017); Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003).

255. FG Hemisphere Assocs. LLC v. République du Congo, 455 F.3d 575 (5th Cir. 2006).

instrumentalities (under § 1610(b)). In *all* cases, the property against which execution is sought must be "in the United States."[256]

Moreover, under § 1610(c), no attachment or execution against either foreign states or their agencies or instrumentalities is permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under § 1608(e).[257]

In addition, before turning to the specific issues of execution, courts must take several important factors into consideration.

1. States vs. agencies and instrumentalities

As they do in deciding jurisdictional issues, courts must take care in enforcing judgments to respect the distinction between the foreign state or government and its agencies and instrumentalities (codified at §§ 1610(a) and (b)). Under the *Bancec* principle,[258] a separate juridical entity cannot be held liable for a judgment against a foreign state, subject to some narrow exceptions.

For example, in *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.,* the Eleventh Circuit Court of Appeals vacated the district court's decision issuing writs of garnishment over amounts owed to a Cuban telecommunications company that was majority-owned by

256. Assets located outside the United States are presumptively beyond the jurisdiction of U.S. courts, and nothing in the FSIA indicates that it has extraterritorial application. *Cf.* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

257. Section 1608(e) states: "No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section."

258. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983); *cf.* Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), *abrogated by* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018).

companies owned and controlled by the Cuban government.[259] Although the telecommunications company was found to be an instrumentality of the government of Cuba, it was held to be a separate entity and therefore not liable for execution of a judgment against the government of Cuba.

Relying on *Bancec*, the court held that in cases of attachment or execution, there is a presumption of separate juridical status for governmental instrumentalities. That presumption can only be overcome either by piercing the corporate veil under state law or by applying the broader equitable principle that "the doctrine of corporate entity will not be regarded where to do so would work fraud or injustice or defeat overriding public policies."[260]

2. Excepted categories of property

Under 28 U.S.C. § 1611, certain categories of property are exempt from attachment and execution. These categories include the following:

- property of international organizations that have been designated under the International Organizations Immunities Act;[261]
- property of a foreign central bank or monetary authority held for its own account;[262] and
- property that is used or intended to be used in connection with a military activity and that is of a military character or under the control of a military authority or defense agency.[263]

259. 183 F.3d 1277, 1284–85 (11th Cir. 1999).

260. *Id.*

261. 22 U.S.C. § 288a–288f (1945). This would include funds being disbursed by the World Bank to a foreign state.

262. *See, e.g.,* Olympic Chartering S.A. v. Ministry of Indus. & Trade of Jordan, 134 F. Supp. 2d 528 (S.D.N.Y. 2000) (central bank); EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007) (central bank funds deposited in U.S. accounts).

263. *E.g.,* HWB Victoria Strategies Portfolio v. Republic of Argentina, No. 17-1085-JTM, 2017 WL 1738065 (D. Kan. May 4, 2017) (jet engines belonging to Fuerza Aérea Argentina); *In re* Ohntrup, 628 F. App'x 809 (3d Cir. 2015) (ammunition); All Am. Trading Corp. v. Cuartel General Fuerza Aerea Guardia Nacional

In addition, attachment and execution cannot be ordered against property that is otherwise inviolable or immune, such as embassies, consulates, or their bank accounts falling under the Vienna Conventions on Diplomatic or Consular Relations.[264]

In *NML Capital, Ltd. v. Banco Central de la Republica Argentina*,[265] the Second Circuit considered the language of § 1611(b)(1) providing that property "of a foreign central bank or monetary authority held for its own account" is immune from attachment or execution. Plaintiffs in that action had sought ex parte orders of pre-judgment attachment and post-judgment restraint over certain funds of Banco Central held at the Federal Reserve Bank of New York. They argued that because Banco Central was not in fact independent of the government (but was its alter ego), the funds did not fall within the scope of that provision. The court of appeals disagreed, finding that

> the plain language, history and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state pursuant to *Bancec*. . . . [F]oreign central banks are not treated as generic "agencies or instrumentalities" of a foreign state under the FSIA: they are given "special protections" befitting the particular sovereign interest in preventing the attachment and execution of central bank property.[266]

3. Procedure

In enforcement actions under the FSIA, courts will generally apply the relevant procedures under applicable state law.[267] However, § 1610(c)

de Nicaragua, 818 F. Supp. 1552 (S.D. Fla. 1993) (foreign military aircraft in United States).

264. Vienna Convention on Diplomatic Relations, Apr. 18, 1961 [1972], 23 U.S.T. 3227, T.I.A.S. No. 7502 (entered into force for the United States Dec. 13, 1972); Vienna Convention on Consular Relations, Apr. 24, 1963 [1970], 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force for the U.S. Dec. 24, 1969).

265. 652 F.3d 172 (2d Cir. 2011), *cert. denied,* 567 U.S. 944 (2012). This presumption is rebuttable, for example, where it can be demonstrated that the funds are not in fact used for central bank functions. *Id.*

266. *Id.* at 187–88.

267. *See* Fed. R. Civ. P. 69(a).

provides that "[n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required" under § 1608(e).[268]

The purpose of this requirement is to give the foreign state in question time to react to the judgment. It has been accepted as mandatory. According to the relevant House Report, the procedures mandated by § 1610(c) exist to afford sufficient protection to foreign states with respect to efforts to attach or execute against their property in the United States (just as the United States would expect in reciprocal circumstances):

> In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.[269]

Consistent with this approach, courts have exercised their discretion to prevent undue hardships to foreign states in a variety of circumstances. For instance, the Second Circuit noted with approval the district court's stay of a lawsuit brought by a lone creditor against the

268. For a discussion of these requirements, see *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 798 F. Supp. 2d 260 (D.D.C. 2011). *See also* First City, Tex. Houston, N.A. v. Rafidain Bank, 197 F.R.D. 250, 256 (S.D.N.Y. 2000).

269. H.R. Rep. No. 94-1487 (1976), at 30, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6629.

Peruvian government when the government was attempting to negotiate an exchange offer with its creditors.[270]

4. Post-judgment discovery

A court may order discovery of a foreign sovereign defendant for purposes of identifying assets against which a judgment might be executed. However, the same prudential considerations that apply in determining initial jurisdiction are relevant in determining the immunity of sovereign assets.[271]

Until recently, there was some debate about the permissible scope of post-judgment discovery in aid of execution. In *Rubin v. Islamic Republic of Iran*,[272] the plaintiffs obtained a default judgment against Iran for injuries sustained in a suicide bombing in Israel carried out by a terrorist organization with the assistance of Iranian material support and training. They registered that judgment in the Northern District of Illinois for the purpose of attaching two collections of Persian antiquities owned by Iran but on long-term academic loan to the University of Chicago's Oriental Institute, as well as a third collection of Persian artifacts owned by Chicago's Field Museum of Natural History.

The court of appeals held that general-assets discovery of all Iranian assets in the United States was inconsistent with the presumption of sovereign immunity under § 1609:

270. Pravin Banker Assocs. Ltd. v. Banco Popular del Peru, 109 F.3d 850, 854–56 (2d Cir. 1997) (district court granted two stays before granting summary judgment).

271. *See generally* Thai Lao Lignite (Thailand) Co. v. Government of Lao People's Democratic Republic, No. 10 Civ. 5256 (KMJ), 2011 WL 4111504, at *4–5 (S.D.N.Y. Sept. 13, 2011); Walters v. People's Republic of China, 672 F. Supp. 2d 573 (S.D.N.Y. 2009); Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 1108 (N.D. Ill. 2004). As the court said in *Lasheen v. Loomis Co.,* No. 2:01-cv-0227-KJM-EFB, 2017 WL 4410167, at *3 (E.D. Cal. Oct. 4, 2017), "[T]he FSIA's exceptions to immunity from execution are still informative of whether plaintiff's discovery requests seek relevant information; e.g. information likely to lead to discovery of executable property" (citing Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 at 2257 (2014).

272. 637 F.3d 783 (7th Cir. 2011).

> To overcome the presumption of immunity, the plaintiff must identify the particular foreign-state property he seeks to attach and then establish that it falls within a statutory exception. The district court's general-asset discovery order turns this presumptive immunity on its head. Instead of confining the proceedings to the specific property the plaintiffs had identified as potentially subject to an exception under the FSIA, the court gave the plaintiffs a "blank check" entitlement to discovery regarding *all* Iranian assets in the United States. This inverts the statutory scheme.[273]

In contrast, in *EM Ltd. v. Republic of Argentina*,[274] the Second Circuit upheld broad subpoenas duces tecum that sought information from two non-party banks about Argentina's assets located *outside* the United States. The court said, "[B]ecause the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed."[275]

The Supreme Court affirmed the Second Circuit's approach in *Republic of Argentina v. NML Capital, Ltd.*,[276] holding that the FSIA does not preclude discovery of Argentina's assets outside the United States—even if they might eventually be found entitled to immunity. The ordinarily applicable rules governing discovery in post-judgment execution proceedings are "quite permissive," the Court noted, and the FSIA contains no provision forbidding or limiting the scope of discovery in aid of execution of a foreign-sovereign judgment debtor's assets, whether they are located within the United States or in other countries. The Court acknowledged that in some instances, sweeping discovery orders might create worrisome international-relations consequences, but it said that such considerations are for the political branches, not the courts. The Court held that "any sort of immunity defense made by

273. *Id.* at 796.

274. 695 F.3d 201 (2d Cir. 2012).

275. *Id.* at 203. Still, the court noted that since "sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction over a foreign sovereign under the FSIA." *Id.* at 210.

276. 134 S. Ct. 2250 (2014).

a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[277]

In conclusion, it is clear that U.S. district courts may order discovery related to assets abroad, even if plaintiffs may have to seek execution on those assets from a foreign court.[278]

5. Sanctions

Whether sanctions in general can be imposed on foreign states is open to debate. On the one hand, nothing in the FSIA expressly provides for such actions; on the other, nothing expressly precludes the exercise of inherent judicial power.[279]

There is some support for the imposition of sanctions on a foreign sovereign under Federal Rule of Civil Procedure 37 for failure to comply with a discovery order.[280] At least one court has distinguished the imposition of those sanctions from the attempt to enforce them (which it said could be "problematic").[281]

277. *Id.* at 2256.

278. Amduso v. Republic of Sudan, 288 F. Supp. 3d 90 (D.D.C. 2017).

279. *Compare* Af-Cap, Inc. v. Republic of the Congo, 462 F.3d 417 (5th Cir. 2006), *and* Autotech Techs. v. Integral Research & Dev., 499 F.3d 737 (7th Cir. 2007). For the executive branch view, see *Brief of the United States as Amicus Curiae, SerVaas Inc. v. Mills*, Nos. 14-385, 14-438, 14-569, 2014 WL 4656925 (Sept. 9, 2014).

280. *See, e.g.,* Funk v. Belneftekhim, 861 F.3d 354 (2d Cir. 2017); Agudas Chasidei Chabad of United States v. Russian Fed'n, 128 F. Supp. 3d 242 (D.D.C. 2015). *See also* Restatement (Fourth) of Foreign Relations Law § 464, Reporters' Note 13 (Am. Law Inst. 2018).

281. FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, 637 F.3d 373, 375 (D.C. Cir. 2011). In an amicus brief in that case, the U.S. government argued that the FSIA "does not permit the enforcement of monetary contempt sanctions against a state." *See* No. 10-7046, 2010 WL 4569107 (Oct. 7, 2010). *See also* Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 128 F. Supp. 3d 242 (D.D.C. 2015). In *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006), the court concluded that a contempt order requiring a foreign sovereign to pay money into the court's registry was inconsistent with the FSIA.

C. Property of a Foreign State

Under § 1610(a), in order to be subject to attachment or execution, the property *of a foreign state* must be (a) located in the United States and (b) "used for a commercial activity." In contrast, under the separate test of § 1610(b)(2), it is sufficient if the *agency or instrumentality* itself is "engaged in commercial activity in the United States." In both instances, however, the property must be in the United States when the court authorizes attachment or execution.[282]

1. Location of the property

Federal courts generally lack the authority to compel execution against property in other countries,[283] and nothing in the text or legislative history of the FSIA suggests that it was intended to apply to the property and assets of a sovereign defendant located *outside* the United States.[284] In general, the immunity of property (or lack thereof) depends on the law of the situs. In a reciprocal circumstance, it seems unlikely that U.S. courts would consider themselves compelled to enforce a foreign judgment against U.S.-located assets which are otherwise entitled to immunity under the FSIA.

Determining the situs can of course raise questions. The Ninth Circuit has held that the situs of an intangible right to payment, under applicable state law, is the location of the debtor, so a debt obligation of a French corporation to the Government of Iran did not constitute "property in the United States" for purposes of § 1610(a)(7).[285]

In *Peterson v. Islamic Republic of Iran*,[286] the Second Circuit faced a similar issue, in the context of an effort to enforce a judgment under

282. *See* FG Hemisphere Assocs., LLC v. République du Congo, 455 F.3d 575, 588–89 (5th Cir. 2006).

283. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2257 (2014).

284. Walters v. People's Republic of China, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009). ("[U]nder the FSIA, assets of foreign states located outside the United States retain their traditional immunity from execution to satisfy judgments entered in United States courts." (internal quotation marks omitted)).

285. Peterson v. Islamic Republic of Iran, 627 F.3d 1117 (9th Cir. 2016).

286. 876 F.3d 63 (2d Cir. 2017).

§§ 1605(a)(7) and 1605A against $1.6 billion in assets allegedly owned by Iran's central bank but held by a Luxembourg bank in Luxembourg. Under New York law, as under California law, the situs of an intangible property interest (such as the right to payment) is the location of the party of whom performance is required by the contract in question; in that case, it was Luxembourg.

However, the court said, the authority of a federal court to enforce judgments by attaching property does not derive from the FSIA but depends instead on the law of the state in which the court sits. The relevant New York law[287] permits a court to order a third-party garnishee subject to its jurisdiction to turn over the assets of a judgment debtor even if they are held outside the United States. Accordingly, since the district court in this case had personal jurisdiction over the Luxembourg bank (which was not a state or agency or instrumentality and thus not entitled to immunity), it was empowered to order that bank to repatriate the assets in question.

The Second Circuit recognized that if the assets, upon being produced in New York, qualified as sovereign assets of a foreign state, they would be subject to § 1609, and therefore the court would be required to consider the relevant statutory exceptions (i.e., under § 1610 and the Terrorism Risk Insurance Act (TRIA) § 201).

The court also acknowledged that the FSIA provides the exclusive basis for obtaining subject-matter jurisdiction *over a foreign state* and was "aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation."[288] It concluded, however, that the FSIA offers no textual impediment to an order directing the third party to bring the assets to New York, since § 1604's grant of jurisdictional immunity applied only

287. N.Y. C.P.L.R. § 5225(b), as interpreted by Koehler v. Bank of Berm. Ltd., 12 N.Y.3d 533, 541, 883 N.Y.S.2d 763 (2009) (a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee).

288. *Peterson*, 876 F.3d at 94 (citing Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993)).

to "a foreign state" and only to assets located "in the United States," neither of which applied to the Luxembourg funds.[289]

Moreover, the court said, the Supreme Court's decision in *NML Capital* stated clearly that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[290] Decisions supporting the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution[291] had been rendered prior to *NML Capital* and are therefore no longer binding on that discrete point.[292]

Even if this interpretation of the law might present "worrisome international-relations consequences," "provoke reciprocal adverse treatment of the United States in foreign courts," or "threaten harm to the United States' foreign relations more generally," the court said, such "apprehensions are better directed to that branch of the government with authority to amend the Act."[293]

2. Used for a commercial purpose

In a commercial activity case, the property of the foreign state must be "used for the commercial activity upon which the claim is based."[294] Accordingly, the statutory definition of "commercial activity" under

289. *Peterson*, 876 F.3d at 92. "Had *Koehler* arisen in the context of an exercise of *in personam* jurisdiction over a foreign sovereign—it did *not*—the FSIA's grant of jurisdictional immunity would supersede contrary state law. *See Peterson*, 627 F.3d at 1130 (applying state law 'insofar as it does not conflict with the FSIA')."

290. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014).

291. *E.g.,* EM Ltd. v. Republic of Argentina, 695 F.3d 201, 208 (2d Cir. 2012); Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 130 (2d Cir. 2009).

292. In this regard, the court distinguished the decision in *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 475 (7th Cir. 2016) (To the effect that before a foreign sovereign's assets are "even potentially subject to attachment and execution," it must be shown that the assets are "within the territorial jurisdiction of the district court.").

293. *Peterson*, 876 F.3d at 94, n.24.

294. 28 U.S.C. § 1610(a)(2) (2010). *Cf.* Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, No. 17-mc-151-LPS, 2018 WL 3812153 (D. Del. Aug. 10, 2018).

§ 1603(d) (discussed above) is applicable.[295] This requirement excludes such property as embassies and consulates, as well as military vessels and aircraft.[296]

The Second Circuit has held that the property in question must be "used for a commercial activity" *at the time* the writ of attachment or execution is issued.[297] The question arose in the context of attempts by holders of defaulted bonds issued by the Republic of Argentina to execute their judgments against certain investment accounts administered in the United States by private corporations for the benefit of Argentine pensioners. The Argentine government had nationalized its private pension system and thus claimed the funds in the investment accounts. The district court determined that the assets were used for a commercial activity and ordered their attachment. The appellate court disagreed, noting that when the attachment was ordered, the only activity that the republic had engaged in was the adoption of a law taking legal control of the funds. Argentinian authorities had not had the opportunity to use the funds for any commercial activity whatsoever. The

295. *See also* Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992).

296. However, the question can still pose difficult factual determinations. *See, e.g.,* EM Ltd. v. Republic of Argentina, 473 F.3d 463, 482–83 (2d Cir. 2007) (government repayment of debt to IMF is not a "commercial activity"); Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1091 (9th Cir. 2007) ("[P]roperty is 'used for a commercial activity in the United States' when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity."); Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240, 260–61 (5th Cir. 2002) (royalty payments owed by oil companies in Texas to a foreign state not "used for a commercial activity in the United States"); Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229, 235–36 (5th Cir. 2004) (signing bonuses and other payments owed by garnishee not used for "commercial activity" within meaning of FSIA); NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P., 788 F. Supp. 2d 111 (C.D. Cal. 2011) (scientific applications satellite not "used for commercial purposes").

297. Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 130 (2d Cir. 2009), *cert. denied,* 130 S. Ct. 1691 (2010). *See also EM Ltd.*, 473 F.3d at 484 ("The plain language of the statute suggests that the standard is actual, not hypothetical, use.").

Second Circuit said, under § 1610(a), "a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity.'"[298]

However, the Second Circuit has also held, in the context of a sale of scientific equipment by one private party to another, that a foreign government's remittance of the purchase price to the seller does constitute market activity—even if the government purchased the equipment in order to implement a national program of scientific research and development, had no "profit motive," and obtained no tangible benefit from the transaction.[299] Since the funds were used for a commercial activity in the United States, they were accordingly subject to attachment under § 1610(a).

Several courts have interpreted this requirement to apply to the entirety of the funds at issue, so that, for example, the use of a portion of a bank account for commercial purposes does not deprive the entire account of its immunity.[300]

3. Additional requirements

It is not sufficient, in a case involving state-owned property, that the property is in the United States and used for a "commercial activity." In addition, the moving party must also satisfy one of the subsidiary requirements in § 1610(a)(1)–(7), which correspond roughly to the exceptions from jurisdictional immunity set forth in § 1605. The specific exception depends on the jurisdictional exception upon which the judgment rests; in other words, the property must relate to the claim on which judgment was rendered.

298. *Aurelius Capital Partners, LP*, 584 F.3d at 131, 132 ("[W]e must respect the Act's strict limitations on attaching and executing upon assets of a foreign state.").

299. NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254 (2d Cir. 2012), *cert. denied,* 133 S. Ct. 273 (2012).

300. Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229, 233–34 (5th Cir. 2004); Liberian E. Timber Corp. v. Government of the Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987).

Different rules apply to judgments based on waivers and arbitral awards. Thus, § 1610(a)(1) addresses waivers. As in the case of jurisdiction, express waivers with respect to attachment and execution are sometimes found in the relevant underlying contracts but must be clearly made on behalf of the foreign state in question.[301] Under § 1610(a)(6), property of a foreign state in the United States which is "used for a commercial activity in the United States" may be attached upon a judgment "based on an order confirming an arbitral award rendered against the foreign state."[302]

4. State sponsors of terrorism

As discussed at greater length in Part VII *infra,* execution of judgments against designated state sponsors of terrorism based on § 1605A (which has replaced § 1605(a)(7)) is governed by the provisions of § 1610(f).

Execution of such judgments against certain "blocked assets" is permitted by § 201 of the Terrorism Risk Insurance Act of 2002 (TRIA).[303] In *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Elahi,* the U.S. Supreme Court held that a judgment creditor of Iran could not execute against a separate entity because (a) the latter judgment did not constitute a "blocked asset" for TRIA purposes at the time of the lower court decision, and (b) in any event, the judgment creditor had waived his right to attachment by electing to take partial payment under the Victims of Trafficking and Violence Protection Act of 2000 judgment in favor of Iran.[304]

301. Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 82–83 (2d Cir. 2002).

302. *See* TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296, 303 (D.C. Cir. 2005).

303. Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified at 28 U.S.C. § 1610 note) (2002); *see* Hegna v. Islamic Republic of Iran, 380 F.3d 1000, 1002–03 (7th Cir. 2004); Weininger v. Castro, 462 F. Supp. 2d 457, 479 (S.D.N.Y. 2006).

304. 556 U.S. 366, 369 (2009).

D. Agency or Instrumentality

Under § 1610(b), which applies to execution against property of an agency or instrumentality located in the United States, the agency or instrumentality itself must be "engaged in commercial activity in the United States."[305] The property itself need not be used for commercial purposes.

In contrast to the rules regarding state-owned property, the property of a foreign agency or instrumentality engaged in commercial activity in the United States is subject to execution, or attachment in aid of execution, if that agency or instrumentality has specifically waived its immunity or if the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of the exceptions concerning commercial activity, noncommercial tort, or state-sponsored terrorism, "regardless of whether the property is or was involved in the act upon which the claim is based."[306]

305. Ministry of Def. & Support for the Armed Forces of the Republic of Iran v. Elahi, 546 U.S. 450, 452 (2006).

306. 28 U.S.C. § 1610(b) (2010).

VII. The FSIA and State-Sponsored Terrorism

The Foreign Sovereign Immunities Act removes the immunity of certain foreign states with respect to claims for damages resulting from death or injury caused by specific acts of state-sponsored terrorism—specifically, torture, extrajudicial killing, aircraft sabotage, hostage taking, and the provision of material support or resources for such acts.

This particular exception is almost unique to the United States, since to date only one other country has adopted a comparable limitation to the general rule of sovereign immunity.[307] The exception is also invoked frequently. It was first enacted in 1996 and was replaced in 2008; steadily growing numbers of plaintiffs have sought to take advantage of its provisions. Most complaints have been filed (and thus most decisions have been rendered) in the District of Columbia, but other courts are likely to encounter issues under this provision, particularly with regard to efforts to enforce judgments against the property and assets of state sponsors of terrorism.

The terrorism exception was originally adopted in 1996 as 28 U.S.C. § 1605(a)(7).[308] Cases initially proliferated against Iran and Cuba, but over time, cases were brought against Libya, Iraq, North Korea, Sudan, and Syria as well. In response to various problems encountered by plaintiffs in litigating under that earlier provision, Congress replaced it in 2008 with an expanded exception, codified at 28 U.S.C. § 1605A.[309] In late 2016, an additional provision was enacted, codified

307. In March 2012, Canada amended its State Immunity Act to permit victims of terrorism who are Canadian citizens and permanent residents of Canada, as well as others if the action has a "real and substantial" connection to Canada, to seek redress against designated state sponsors by way of a civil action for terrorist acts committed anywhere in the world on or after January 1, 1985. *See* http://laws-lois.justice.gc.ca/PDF/S-18.pdf.

308. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

309. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338, 338–44 (NDAA) (codified at 28 U.S.C. § 1605A).

at 28 U.S.C. § 1605B, to address acts of terrorism occurring in the United States (i.e., the attacks which occurred on 9/11).[310]

Taken as a whole, the terrorism exception is "anything but a model of clarity,"[311] and a substantial body of interpretive decisional law has emerged in the area.[312]

This part of the guide provides an overview of the background and purpose of the FSIA's "terrorism exception" (in section A), describes the current exception (in section B), and discusses the main elements of a claim under the provision (in section C). Section D summarizes issues related to execution of judgments against state sponsors of terrorism under § 1605A. Section E introduces the most recent statutory amendment, the Justice Against Sponsors of Terrorism Act (JASTA). This part of the guide builds upon and occasionally refers to the analysis offered in the rest of this guide.

Litigation against foreign states under these provisions must be distinguished from civil suits against individuals and non-state entities under the provisions of the 1991 Torture Victims Protection Act (TVPA)[313] and the Anti-Terrorism Act (ATA), enacted in 1992 and amended by JASTA.[314] However, although § 1605A provides its own

310. Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222 § 3(a), Sept. 28, 2016, 130 Stat. 853 (codified at 28 U.S.C. § 1605B).

311. Roeder v. Islamic Republic of Iran, 742 F. Supp. 2d 1, 13 (D.D.C. 2010) (citing the government's brief).

312. A comprehensive review of the exception in its early years can be found in *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31 (D.D.C. 2009). *See generally* Restatement (Fourth) of Foreign Relations Law § 460 (Am. Law Inst. 2018).

313. Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note) (1991). The TVPA provides a statutory cause of action against individuals who, under actual or apparent authority, or color of law, of any foreign nation, subject victims to torture or extrajudicial killing.

314. 18 U.S.C. § 2333(a). The ATA provides that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."

federal cause of action, it defines the terms "torture" and "extrajudicial killing" by reference to the TVPA,[315] and the term "material support or resources" by reference to the ATA,[316] so courts often refer to decisions under those statutes in considering claims under § 1605A[317] and will surely do so under § 1605B.

A. Background and Purpose

Although victims' groups had long advocated for a "terrorist" exception to foreign sovereign immunity, no such provision was included in the FSIA when it was originally enacted in 1976.[318] Only after several significant terrorist incidents in the 1980s and 1990s (for example, the kidnapping of Joseph Ciccipio in Beirut and the destruction of Pan Am Flight 103 over Lockerbie, Scotland) did Congress amend the statute to permit suits against state sponsors of terrorism.[319]

> State sponsors of terrorism consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false

The statute contains a definition of "international terrorism," and a related provision provides civil liability for those engaged in "material support" of terrorist organizations. *See* 18 U.S.C.A. §§ 2331 and 2339B (2009); Owens v. BNP Paribas, S.A., 897 F.3d 266 (D.C. Cir. 2018); Linde v. Arab Bank, PLC, 882 F.3d 314 (2d Cir. 2018); Waldman v. Palestine Liberation Org., 835 F.3d 317 (D.C. Cir. 2016).

315. 28 U.S.C. § 1605A(h)(7).

316. 28 U.S.C. § 1605(h)(3). The term "material support" is defined at 18 U.S.C. § 2339A(b)(1).

317. On occasion, a particular terrorist incident may give rise to claims under more than one of these statutes. *E.g.*, Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22 (D.D.C. 2016).

318. The executive branch resisted, fearing that a terrorism exception would "cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States." Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002). *See also* H.R. Rep. No. 103-702, at 12 (1994); Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017), *cert. petition docketed*, April 10, 2018.

319. *See* Presidential Statement Upon Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. of Pres. Doc. 719 (Apr. 29, 1996).

> travel documentation, and the like. . . . [A]llowing suits in the federal courts against countries responsible for terrorist acts where Americans and/or their loved ones suffer injury or death at the hands of the terrorist states is warranted. Section 804 will give American citizens an important economic and financial weapon against these outlaw states.[320]

As originally enacted, § 1605(a)(7) removed the immunity of foreign states with respect to cases seeking money damages for personal injury or death caused by certain enumerated acts taken by those states or their officials. The exception was limited to those few states that had been formally designated by the Secretary of State as sponsors of terrorism under § 6(j) of the Export Administration Act of 1979[321] or § 620A of the Foreign Assistance Act of 1961[322] at the time the acts in question had occurred or as a result of such acts. In 1996, this list included Cuba, Iran, Libya, North Korea, Sudan, Syria, and Iraq.[323]

In addition, the original exception only permitted suits arising from acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources, and only if such acts or provision of material support had been engaged in by an official, employee, or agent of the foreign state while acting within the scope of his or her office, employment, or agency.

The impact of § 1605(a)(7) as initially enacted was further circumscribed when courts interpreted it as "merely a jurisdiction-conferring provision" that did not create an independent private right of action. In *Flatow v. Islamic Republic of Iran*, for example, the district court ruled that the statutory exception to foreign sovereign immunity did

320. H.R. Rep. No. 104-383, at 62 (1995).

321. Section 6(j) of the Export Administration Act of 1979 was codified at 50 U.S.C. app. § 2405(j) and later transferred to 50 U.S.C. § 4605.

322. Section 620A of the Foreign Assistance Act of 1961 is codified at 22 U.S.C. § 2371.

323. Iraq was removed in 2004, Libya in 2006, and North Korea in 2008. As of November 2018, the designees are the Democratic Peoples' Republic of North Korea, Iran, Sudan, and Syria. *See* the Department of State website at https://www.state.gov/j/ct/list/c14151.htm.

not itself create a federal cause of action.[324] Instead, the statute operated merely as a "pass-through," allowing plaintiffs to bring suit in federal court for claims based in state law.

Given the difficulties encountered by plaintiffs seeking to recover for injuries occurring abroad under state tort statutes or general common law, this interpretation sharply limited the reach of the exception. Differences in state law produced disparate results for victims of the same terrorist act, depending on their domicile at the time of the attack.

In response, Congress passed the so-called Flatow Amendment.[325] This amendment sought to clarify the liability of any official, employee, or agent of a designated state sponsor of terrorism for personal injury or death caused to a U.S. national by acts of that official, employee, or agent while acting within the scope of his or her office, employment, or agency. It also provided that money damages in FSIA suits could include economic damages, solatium, pain and suffering, and punitive damages.

However, the Flatow Amendment failed to resolve the most significant obstacles facing plaintiffs under the statute. While some courts held that it provided a cause of action against a foreign state itself,[326] others found that it provided a cause of action only against the individual officials, employees, or agents of a foreign state. In *Cicippio-Puleo v. Islamic Republic of Iran*, for example, the D.C. Circuit held that neither § 1605(a)(7) nor the Flatow Amendment, nor the two taken in tandem,

324. 999 F. Supp. 1 (D.D.C. 1998). Alisa Flatow, a Brandeis University student, was killed by a terrorist attack while traveling on a bus in the Gaza Strip when a suicide bomber drove a van full of explosives into the bus. The failure of the litigation provoked sufficient political pressure to prompt legislative action.

325. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, Div. A, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605 note (2006)).

326. *See, e.g.,* Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 214 (D.D.C. 2003); Kilburn v. Republic of Iran, 277 F. Supp. 2d 24 (D.D.C. 2003); Pugh v. Socialist People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54 (D.D.C. 2003).

created a private right of action against foreign state sponsors of terrorism.[327] In *Acree v. Republic of Iraq*, the same court held that plaintiffs could not state a cause of action under the "generic common law" or merely allude "to the traditional torts . . . in their generic form" but must identify a "particular cause of action arising out of a specific source of law."[328]

In consequence, § 1605(a)(7) was repealed and replaced in 2008 by the current version, codified at 28 U.S.C. § 1605A. Although in many respects its operative language is virtually identical to that of its predecessor, the current provision clearly established a private right of action, recodified the provisions for the award of punitive damages, authorized compensation for special masters to assist the courts in resolving cases, and incorporated new mechanisms for the enforcement of judgments.[329] In various ways, however, the revised statute continues to present interpretive challenges.

B. The Current Exception

By its terms, § 1605A provides that a foreign state is not immune from the jurisdiction of courts of the United States (or of the states) in any case in which money damages are sought for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.

More specifically, to establish subject-matter jurisdiction under this exception,[330] a plaintiff must prove three elements:

327. 353 F.3d 1024 (D.C. Cir. 2004). In so doing, it removed the basis for punitive damage awards.

328. 370 F.3d 41, 59–60 (D.C. Cir. 2004). For general background, see E. Perot Bissell V & Joseph R. Schottenfeld, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 Yale L.J. 1890 (2018). For an example of "state-by-state" analysis of claims under § 1605(a)(7), see *Estate of Heiser v. Islamic Republic of Iran,* 466 F. Supp. 2d 229 (D.D.C. 2006) (*Heiser I*).

329. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 39 (D.D.C. 2009).

330. Personal jurisdiction of course depends on proper service under § 1608. *See* 28 U.S.C. § 1330(b).

1. that the foreign country was designated a "state sponsor of terrorism" at the time (or as a result) of the act;
2. if the act in question occurred in the foreign state against which the claim is brought, that the claimant has afforded that state a reasonable opportunity to arbitrate the claim; and
3. that the plaintiff seeks monetary damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if "engaged in by an official, employee, or agent" of that country while acting within the scope of his or her office, employment, or agency."[331]

Within this grant of jurisdiction under § 1605A(a), the courts have discerned a distinction between (1) suits brought by U.S. citizen victims (and their legal representatives) and (2) suits brought by non-U.S. citizens. This distinction has, in turn, led to the need to resolve questions of exclusivity and choice of law.

1. Federal cause of action

The statute creates a federal private right of action against designated state sponsors of terrorism for damages for personal injury or death resulting from the specified types of terrorist acts. Under § 1605A(c), however, such actions may only be pursued by four categories of individuals:

1. a national of the United States;
2. a member of the U.S. armed forces;
3. an employee of the U.S. government or of an individual performing a contract awarded by the U.S. government, acting within the scope of the employee's employment; or
4. a legal representative of such a person.[332]

331. 28 U.S.C. § 1605A(a).

332. The term "national," as defined in 8 U.S.C. § 1101(a)(22), is broader than "citizen." However, the courts have resisted accepting claims of permanent allegiance as qualifying under § 1605A(c). *See, e.g., In re* Terrorist Attacks on Sept.

For this purpose, the term "national" means a person who is either a U.S. citizen or owed allegiance to the United States at the time of the terrorist acts in question.[333] Plaintiffs may include victims (defined as "those who suffered injury or died as a result of the attack") and claimants (defined as "those whose claims arise out of those injuries or deaths but who might not be victims themselves").[334] Under this approach, claimants may include members of a victim's immediate family who suffered from intentional (or negligent) infliction of emotional distress.

Whether the plaintiffs are victims or claimants, the nationality requirements must be satisfied as of the time of the attack. In *Acosta v. Islamic Republic of Iran*, for example, the claims arose from the 1990 assassination of Israeli Rabbi Meir Kahane in New York City. Because Rabbi Kahane was not a U.S. citizen, claims on his behalf fell outside the statute, but claims for severe mental anguish of his wife and family, who were citizens, were allowed to proceed.[335]

Several courts have rejected claims by individuals who were not "immediate family members" at the time of the attack in question.[336] As one court stated,

> The very nature of a claim for solatium or intentional infliction of emotional distress necessitates a relationship between the victim and the claimant at the time of the attack. Intentional infliction of emotional distress requires

11, 2001, No. 03-MDL-1570 (GBD)(SN), 2017 WL 2671083 (S.D.N.Y. June 21, 2017); Mohammadi v. Islamic Republic of Iran, 782 F.3d 9, 14 (D.C. Cir. 2015); *cf.* Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15, 26 (D.D.C. 2008) (Congress did not intend that "a cause of action under § 1605A remain available to those persons who voluntarily and deliberately renounce American citizenship").

333. Under § 1605A(h)(5), the term "national of the United States" is defined by reference to 8 U.S.C. § 1101(a)(22) (either a "citizen of the United States" or a "person who, though not a citizen of the United States, owes permanent allegiance to the United States"). *See, e.g.*, Mohammadi v. Islamic Republic of Iran, 782 F.3d 9 (D.C. Cir. 2015).

334. Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51, 65 (D.D.C. 2010).

335. *Acosta*, 574 F. Supp. 2d at 15.

336. *See, e.g., Murphy,* 740 F. Supp. 2d at 51; Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25, 45 (D.D.C. 2007); Bettis v. Islamic Republic of Iran, 315 F.3d 325, 334–35 (D.C. Cir. 2003).

> an element of shock. If the definition of emotional distress were expanded to include claimants who were not immediate family members at the time of the attack, the potential number of claimants would be unidentifiable, changing with every new marriage or new child.[337]

Non-citizens and non-nationals can satisfy this requirement only if, at the relevant time, they were either members of the U.S. armed forces or "otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment."[338]

2. Third-party (or indirect) actions

By distinction, the courts have held that § 1605A(a) also provides subject-matter jurisdiction over "third-party" (or "indirect") claims brought by non-citizen family members (or representatives of such individuals) when authorized under "applicable state or local law," even though these individuals cannot invoke the federal cause of action under § 1605A(c).[339]

The D.C. Circuit addressed this issue in *Owens v. Republic of Sudan*, noting that § 1605A(c) is restricted to "victims or their legal representatives," while § 1605A(a) applies to "the claimant or the victim."[340] This difference in wording, it concluded, reflected congressional intent to give the latter a broader scope than the former. Thus understood, § 1605A(c) is not exclusive. Section 1605A(a) "grants a court jurisdiction to hear a claim brought by a third-party claimant who is not the legal representative of a victim physically injured by a terrorist attack."[341] Such claimants are not bound by the nationality

337. Baker v. Socialist People's Libyan Arab Jamahirya, 775 F. Supp. 2d 48, 75 (D.D.C. 2011).

338. 28 U.S.C. § 1605A(a)(2)(ii)(III) (2008).

339. *See, e.g.,* Fraenkel v. Islamic Republic of Iran, 892 F.3d 348, 353 (D.C. Cir. 2018).

340. 864 F.3d 751, 804–09 (D.C. Cir. 2017), *petition for cert. docketed*, No. 17-1236 (Mar. 6, 2018). *See also* Fraenkel v. Islamic Republic of Iran, 892 F.3d 348, 353 (D.C. Cir. 2018).

341. *Owens*, 864 F.3d at 807.

requirements of § 1605A(a)(2)(A)(ii). Who may bring such a claim, and for what, is therefore a matter of otherwise applicable substantive law.

Most third-party claimants have been foreign national family members of U.S.-citizen victims (not their "legal representatives") seeking damages for intentional infliction of emotional distress, solatium, and punitive damages.

3. Exclusivity

The FSIA is of course the exclusive basis for pursuing claims against foreign states and their agencies and instrumentalities in U.S. courts. The federal cause of action under § 1605A(c) is available exclusively to individuals meeting the specified nationality requirements. However, the courts have had to address issues of exclusivity in several other respects.

One question is whether the state-sponsored terrorism exception provides the exclusive basis for bringing suits that fall within its substantive scope. Initially, the Second Circuit answered in the affirmative with respect to other FSIA provisions, so that if the conduct in question constituted "terrorism" within the scope of the exception, then none of the FSIA's other exceptions (such as the noncommercial tort exception) applied. In 2010, the court held that although the acts listed in the terrorism exception are by definition "torts," plaintiffs could not bring their claims under § 1605(a)(5) if they properly fell under the terrorism exception, since to do so would "evade and frustrate that key limitation" on the terrorism exception.[342]

342. *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 88–89 (2d Cir. 2008), *abrogated on other grounds by* Samantar v. Yousuf, 560 U.S. 305 (2010). Similarly, the Fifth, Seventh, and Ninth Circuits also rejected attempts by a plaintiff to "shoehorn" a claim properly brought under one exception into another. *See* de Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1398–99 (5th Cir. 1985); Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250, 254 (7th Cir. 1983); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990).

Subsequently, however, the Second Circuit took a different approach, holding that "the terrorism exception, rather than limiting the jurisdiction conferred by the noncommercial tort exception, provides an additional basis for jurisdiction."[343] In so deciding, the court focused on the fact that in § 1605A(a)(1), Congress had expressly limited the exception to "any case not otherwise covered by [the FSIA]," meaning that it was intended "to cover some injuries that the noncommercial tort exception does not reach."[344]

A second question is whether the availability of the federal cause of action for specified claimants excludes the possibility for them to seek recovery under *state* law. The answer appears to be yes: "For persons covered by the private right of action in § 1605A(c) state law claims are not actionable."[345]

At the same time, non-citizen claimants are precluded from proceeding under § 1605A(c), although they "may continue to pursue claims under applicable state and/or foreign law."[346]

343. Doe v. Bin Laden, 663 F.3d 64, 70 (2d Cir. 2011).

344. *Id.* at 70. The court acknowledged that its holding conflicted with the 2010 decision, but said that the panel in that earlier case had been presented "with sparse and one-sided argument on this point in the context of a very large and complex case that focused on other aspects of the FSIA." *Id.* at n.10. *See also In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 109 (2d Cir. 2013).

345. Fraenkel v. Islamic Republic of Iran, 248 F. Supp. 3d 21, 34 (D.D.C. 2017); *cf.* Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 66 (D.D.C. 2008) ("state law no longer controls the nature of the liability and damages that may be sought . . .; Congress has provided the 'specific source of law' for recovery."); Rux v. Republic of Sudan, 672 F. Supp. 2d 726 (E.D. Va. 2009), *aff'd,* 410 F. App'x 581 (4th Cir. 2011) (holding, in a case arising from the bombing of the U.S.S. Cole in October 2000, that the federal Death on the High Seas Act provided plaintiffs' exclusive cause of action and precluded reliance on state law as well as § 1605A).

346. Owens v. Republic of Sudan, 826 F. Supp. 2d 128, 153 (D.D.C. 2011) (non-U.S.-citizen family members of foreign national employees of the U.S. embassy in Beirut who were killed or injured in terrorist attacks lacked a federal cause of action under § 1605A).

4. Applicable law/choice of law

The existence of a federal cause of action under § 1605A(c)[347] does not resolve the applicable law problem, however, since the statute provides no guidance on the substantive bases for liability in determining plaintiffs' entitlement to damages. By definition, the same question arises for third-party or derivative claims with respect to not only damages but also causes of action.

"Choice of law" questions are not determined by the FSIA itself, but (by operation of § 1606) must instead be determined with reference to the law of the forum (or the law of the place where the attacks took place).[348] Consequently, courts have applied "general principles of tort law," such as those articulated in the *Restatement (Second) of Torts*, to determine liability for personal injury or death resulting from acts caused by the designated state sponsor or its officials, employees, or agents, as well as entitlement to pain and suffering, economic damages, solatium, and punitive damages.[349]

347. In establishing a private right of action and in specifying the damages that may be claimed, the amended provisions were intended to resolve the issues created by *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) (holding that neither § 1605(a)(7) nor the Flatow Amendment, nor the two taken in tandem, created a private right of action against a foreign government), and *Acree v. Republic of Iraq,* 370 F.3d 41 (D.C. Cir. 2004) (holding that plaintiffs could not state a right of action under the "generic common law" or merely allude "to the traditional torts . . . in their generic form" but must identify a "particular cause of action arising out of a specific source of law"). *See, e.g.,* the discussion in Leibovitch v. Islamic Republic of Iran, 697 F.3d 561 (7th Cir. 2012).

348. *Fraenkel*, 248 F. Supp. 3d at 38–40; Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22, 41–47 (D.D.C. 2016); Leibovitch v. Syrian Arab Republic, 25 F. Supp. 3d 1071 (N.D. Ill. 2014).

349. Akins v. Islamic Republic of Iran, No. 17-675 (BAH), 2018 WL 4308584, at *20 (D.D.C. Sept. 10, 2018); Roth v. Islamic Republic of Iran, 78 F. Supp. 3d 379, 399 (D.D.C. 2015) (citing Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44, 54 (D.D.C. 2012)).

5. Statute of limitations

Under § 1605A(b), suits under § 1605A are subject to a ten-year limitations period: they must be brought or maintained no later than ten years after the date on which the cause of action arose *or* after April 24, 1996, whichever is later. This latter provision represented a significant change from the previous version of the exception, under which a number of cases were dismissed because they had been filed after the ten-year period following the acts in question.[350]

6. Default

In the vast majority of state-sponsored terrorism cases brought under § 1605A, neither the foreign state nor the individuals named as defendants appear or answer. However, because jurisdiction under the FSIA depends on a determination that the defendants in such cases are not entitled to immunity, the court must nonetheless determine whether the case falls within the terms of the exception and that the defendant is not entitled to immunity.

Moreover, entry of default is not automatic. Section 1608(e) provides that a default judgment can be entered against a foreign state only after the plaintiff "establishes his claim or right to relief by evidence that is satisfactory to the court." This provision imposes an "affirmative obligation" on the court to determine whether it has subject-matter jurisdiction.[351] In making that determination, the court may not simply accept the plaintiff's unsupported allegations, but must conduct further inquiry before entering judgment.[352] It may accept as true uncontroverted evidence offered by the plaintiff and may take judicial notice of

350. *See, e.g.,* Maalouf v. Islamic Republic of Iran, 306 F. Supp. 3d 203 (D.D.C. 2018).

351. Sheikh v. Republic of Sudan, 308 F. Supp. 3d 46 (D.D.C. 2018); Fraenkel v. Islamic Republic of Iran, 248 F. Supp. 3d 21, 32 (D.D.C. 2017) (plaintiff must present a legally sufficient prima facie case); Cohen v. Islamic Republic of Iran, 238 F. Supp. 3d 71 (D.D.C. 2017); Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22 (D.D.C. 2016).

352. Stansell v. Republic of Cuba, 217 F. Supp. 3d 320 (D.D.C. 2016); Moradi v. Islamic Republic of Iran, 77 F. Supp. 3d 57 (D.D.C. 2015).

court records in related proceedings.[353] Several recent decisions have addressed when and to what extent a court may take judicial notice of prior findings of fact in related proceedings before the same court.[354]

7. Discovery

Since default is the norm, discovery requests directed to the defendants do not typically pose problems in terrorism cases. Regarding discovery requests directed to the U.S. government, the special rules set forth in § 1605(g) remain applicable. That provision requires the court, upon request of the U.S. Attorney General, to stay

> any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

In addition to various time limits and other limitations, § 1605(g)(4) provides that "a stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure."

C. Main Elements of a Claim Under § 1605A

The following sections outline the main requirements of a claim brought under § 1605A.

1. Designated state sponsor of terrorism

At the time of (or as a result of) the act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources in question, the Secretary of State must have formally designated the foreign state as a government that has "repeatedly provided

353. Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24 (D.D.C. 2012); Haim v. Islamic Republic of Iran, 784 F. Supp. 2d 1 (D.D.C. 2011).

354. *E.g.,* Foley v. Syrian Arab Republic, 249 F. Supp. 3d 186 (D.D.C. 2017); Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93 (D.D.C. 2015); Roth v. Islamic Republic of Iran, 78 F. Supp. 3d 379 (D.D.C. 2015).

support for acts of international terrorism" pursuant to § 6(j) of the Export Administration Act of 1979, § 620A of the Foreign Assistance Act of 1961, § 40 of the Arms Export Control Act, or any other relevant provision of law.[355]

The list of designated state sponsors of terrorism is published on April 30 of each year. If the foreign state is not on the list at the time of the act or acts in question (or as a result of them), the terrorism exception does not apply.[356] As of November 2018, four countries were on the list: The Democratic Peoples' Republic of Korea, Iran, Sudan, and Syria.[357]

The removal of a state from the list of designated state sponsors does not automatically result in the termination of pending litigation against that state, but such termination can be accomplished legislatively. Following the overthrow of Saddam Hussein, for instance, Congress passed legislation that permitted the President to make the terrorism exception to immunity under former § 1605(a)(7) inapplicable to Iraq, depriving the courts of jurisdiction over then-pending actions. In *Republic of Iraq v. Beaty*,[358] the U.S. Supreme Court upheld the President's exercise of this authority: "When the President exercised his authority to make inapplicable to Iraq all provisions of law that apply to countries that have supported terrorism, the exception to foreign sovereign immunity for state sponsors of terrorism became inoperative as against Iraq."[359]

355. 28 U.S.C. § 1605A(h)(6) (2008). *See also* 28 U.S.C. § 1605A(a)(2)(A)(i)-(II) (2008) (if the action is a "related" or "prior" action, the foreign state must have been designated as a state sponsor of terrorism when the original action or the related action was filed).

356. 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (2008).

357. *See* U.S. Department of State, State Sponsors of Terrorism, http://www.state.gov/j/ct/list/c14151.htm.

358. 556 U.S. 848 (2009), upholding Pres. Determ. No. 2003-23, 68 Fed. Reg. 26459 (May 7, 2003), under sections 1503 and 1504 of the Emergency Wartime Supplemental Act of 2003, Pub. L. No. 108–11, 117 Stat 559.

359. 556 U.S. at 866. In so doing, the Court overruled several lower courts. *See, e.g.,* Kilburn v. Republic of Iran, 441 F. Supp. 2d 74, 78 (D.D.C. 2006) ("[T]he acts in question occurred while the defendant was designated as a state sponsor of

2. Listed acts

Under § 1605A(a)(1), the plaintiff must sufficiently allege that one of the following specified acts has been committed: "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act."

a. Torture

For purposes of § 1605A, "torture" has the meaning given to that term in section 3 of the Torture Victim Protection Act of 1991:

> Torture means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.[360]

One of the most important elements of this definition is its severity requirement. Courts must examine the "degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim."[361] The purpose is to ensure that the conduct proscribed by the 1984 United Nations Convention Against Torture[362] and the Torture

terrorism, and the Presidential Determination [removing Libya from the list] does not divest the court of jurisdiction over the case."); Fisher v. Great Socialist People's Libyan Arab Jamahiriya, 541 F. Supp. 2d 46, 51–52 (D.D.C. 2008).

360. 28 U.S.C. § 1605A(h)(7) (2008). The Torture Victim Protection Act of 1991, § 3(b)(1), Pub. L. No. 102-256, 106 Stat. 73, is codified at 28 U.S.C. § 1350 note (1992).

361. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92–93 (D.C. Cir. 2002).

362. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (in force for the United States, Nov. 20, 1994).

Victim Protection Act is "sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes."[363]

This examination will typically require a factual inquiry. As the court in *Price v. Socialist People's Libyan Arab Jamahiriya* pointed out, torture does not automatically result whenever an individual in custody is the subject of physical assault.[364] However, deprivation of adequate food, light, toilet facilities, and medical care over a prolonged period of captivity has been found to meet the statutory requirement.[365]

b. Extrajudicial killing

The term "extrajudicial killing" also has the meaning given in the Torture Victim Protection Act, namely, "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[366] An assassination qualifies.[367]

In *Campuzano v. Islamic Republic of Iran*, the U.S. District Court for the District of Columbia held that suicide bombings resulting in injury to the plaintiffs constituted extrajudicial killings within the scope

363. *Price,* 294 F.3d at 92.

364. *Id.* at 93 ("Not all police brutality, not every instance of excessive force used against prisoners, is torture under the FSIA."). *See also* Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044, 1050 (D.C. Cir. 2014) ("To qualify as torture, the mistreatment must be purposeful"); Hekmati v. Islamic Republic of Iran, 278 F. Supp. 3d 145, 159–61 (D.D.C. 2017) (definition of torture).

365. *See, e.g.*, Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 32 (D.D.C. 2001), *aff'd sub nom*. Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001) (The court found that the "deprivation of adequate food, light, toilet facilities, and medical care for over six years amounts to torture").

366. 28 U.S.C. § 1605A(h)(7) (2008); Torture Victim Protection Act of 1991, § 3(a). *See* Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017), *cert. petition docketed*, Mar. 6, 2018.

367. Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 107 (D.D.C. 2000).

of the state-sponsored terrorism exception.[368] However, in *Wyatt v. Syrian Arab Republic*, an extrajudicial killing claim did not succeed when two soldiers, unknown and unrelated to the plaintiffs, were killed while attempting to rescue the plaintiff-hostages.[369] The *Wyatt* court distinguished *Campuzano* by pointing out that the death of the soldiers in *Wyatt* caused no physical injury to the plaintiffs, whereas the *Campuzano* suicide bombs physically injured the plaintiffs.[370]

More recently, in *Owens*, the D.C. Circuit rejected the argument that for purposes of § 1605A an extrajudicial killing may only be committed by a "state actor."[371] In *Gill v. Islamic Republic of Iran*, the district court found that an attempted extrajudicial killing falls within the statutory definition "even if no one died as a result of that attempt."[372]

c. Aircraft sabotage

The statute defines "aircraft sabotage" by reference to Article 1 of the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, commonly referred to as the Montreal Convention.[373] Under that article, a person commits an offense if he or she unlawfully and intentionally:

> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft;
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;

368. 281 F. Supp. 2d 258, 269–70 (D.D.C. 2003); *cf.* Flanagan v. Republic of Iran, 190 F. Supp. 3d 138 (D.D.C. 2016) (bombing of U.S.S. Cole).

369. 362 F. Supp. 2d 103, 111–12 (D.D.C. 2005).

370. *Id.* at 112.

371. Owens v. Republic of Sudan, 864 F.3d 751, 771–72 (D.C. Cir. 2017), *cert. petition docketed,* Mar. 6, 2018.

372. Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88 (D.D.C. 2017); Fritz v. Islamic Republic of Iran, 320 F. Supp. 3d 48, 83–85 (D.D.C. 2018).

373. 28 U.S.C. § 1605A(h)(1). Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [hereinafter Montreal Convention], Sept. 23, 1971, 974 U.N.T.S. 178, 24 U.S.T. 564, T.I.A.S. No. 7570. The offenses are codified at 18 U.S.C. § 32(a)(3) & (6) (2006).

> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;
>
> (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
>
> (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.[374]

A person also commits an offense if he or she (a) attempts to commit any of the offenses mentioned above or (b) is an accomplice of a person who commits or attempts such an offense.

Aircraft sabotage claims were sustained in *Pugh v. Socialist People's Libyan Arab Jamahiriya*[375] and *Rein v. Socialist People's Libyan Arab Jamahiriya*.[376] In *Pugh*, claims were brought on behalf of seven American citizens killed on September 19, 1989, when UTA Flight 772, en route from Brazzaville to Paris, exploded in mid-air over southeastern Niger, killing all aboard. *Rein* involved claims by the survivors and representatives of persons killed aboard Pan Am Flight 103 above Lockerbie, Scotland.

d. Hostage taking

The statute adopts the definition of "hostage taking" used in Article 1 of the International Convention Against the Taking of Hostages, according to which hostage taking occurs when a person "seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage."[377]

374. Montreal Convention, at 1.

375. 290 F. Supp. 2d 54 (D.D.C. 2003).

376. 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part*, 162 F.3d 748 (2d Cir. 1998).

377. 28 U.S.C. § 1605A(h)(2); International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 45, U.N. Doc. A/34/45, at 245 (June 3, 1983), 1316 U.N.T.S. 205, T.I.A.S. No. 1108, 18 ILM 1456 (entered into force for the United States Jan. 6, 1985).

An essential element of this claim is that the "intended purpose of the detention be to accomplish the sort of third-party compulsion described in the convention."[378] For instance, in *Price v. Socialist People's Libyan Arab Jamahiriya*, this compulsion element was not satisfied when the detention of the plaintiffs was undertaken to "express[] support for illegal behavior" rather than to compel a third party to act.[379]

Additionally, because the definition of "hostage taking" focuses on the state of mind of the individual detaining the hostages, it is not necessary for the hostage-taker to communicate his or her intended purpose to a third party in order for the element to be fulfilled.[380]

e. Material support or resources

This statutory element incorporates the broad meaning given to the term "material support or resources" in the Anti-Terrorism Act (as recently amended by JASTA), which lists various types of support, including "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . ., and transportation, except medicine or religious materials."[381] A plaintiff may satisfy this requirement by identifying conduct by the defendant that falls within the "meaning of any one of these listed forms of material support."[382]

Evidence that a foreign state has provided financial, technical, logistical, and other material support and resources to terrorist groups for the purpose of carrying out any of the above listed types of support

378. Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230, 235 (D.C. Cir. 2003).

379. 294 F.3d 82, 94 (D.C. Cir. 2002).

380. Simpson v. Socialist People's Libyan Arab Jamahiriya, 470 F.3d 356, 360 (D.C. Cir. 2006); Fritz v. Islamic Republic of Iran, 320 F. Supp. 3d 48, 78–79 (D.D.C. 2018).

381. 28 U.S.C. § 1605A(h)(3), referring to 18 U.S.C. § 2339A(b)(1).

382. Rux v. Republic of Sudan, 461 F.3d 461, 470 (4th Cir. 2006).

is sufficient.[383] It is important to note that it is not necessary for the material support to have directly contributed to the specific act under which the claims arose.[384] However, at least one of the acts listed above must occur as a result of the material support in order for the terrorism exception to apply.[385]

3. Scope of authority

The private right of action provided by § 1605A recognizes that both the foreign state itself and any official, employee, or agent of that state can be held liable for personal injury or death resulting from any of the enumerated acts specified by the statute.[386] The acts must have been committed by the official, employee, or agent "while acting within the scope of his or her office, employment or agency." The statute expressly makes the foreign state "vicariously liable for the acts of its officials, employees, or agents."[387]

Whether the specific acts in question fall within "the scope of a defendant's office, employment, or agency" appears to be addressed as a factual question. In *Rux v. Republic of Sudan*, for example, the Fourth Circuit found that plaintiffs had "easily" satisfied this requirement by alleging that Sudanese President Bashir had authorized Al-Qaeda operatives to enter Sudan and had given Al-Qaeda special authority to

383. *See, e.g.,* Beer v. Islamic Republic of Iran, No. 08-cv-1807 (RCL), 2010 WL 5105174, at *11–12 (D.D.C. Dec. 9, 2010).

384. Valencia v. Islamic Republic of Iran, 774 F. Supp. 2d 1 (D.D.C. 2010).

385. "To determine whether a defendant sovereign has provided material support to terrorism, courts consider first, whether a particular terrorist group committed the terrorist act and second, whether the defendant foreign state generally provided material support or resources to the terrorist organization which contributed to its ability to carry out the terrorist act." Fraenkel v. Islamic Republic of Iran, 248 F. Supp. 3d 21, 36 (D.D.C. 2017), *aff'd in part,* 892 F.3d 348 (D.C. Cir. 2018).

386. 28 U.S.C. § 1605A(c) (2008). This distinguishes the terrorism exception from the other exceptions in the FSIA, since the Supreme Court held, in *Samantar v. Yousuf*, 560 U.S. 305, 324–25 (2010), that the statute does not apply to individuals.

387. 28 U.S.C. § 1605A(c) (2010).

avoid paying taxes and duties.[388] Bashir, the court said, was clearly "an official, employee, or agent" of Sudan by virtue of his elected position, and his alleged actions fell "within the scope of his . . . office, employment, or agency" because each involved the exercise of the governmental authority vested in the office of president by Sudan's constitution.[389] The court also acknowledged other actions that involved governmental officials acting within the scope of their offices, including using diplomatic pouches, allowing the "establishment and operation of terrorist training camps, and establishing financial joint ventures between Sudan and Al-Qaeda."[390]

In *Taylor v. Islamic Republic of Iran*, which arose from the bombing of the U.S. Marine barracks in Beirut, the court determined that Iran had been "directly tied to the actions undertaken by the members of Hezbollah" and played a "crucial and necessary role in planning and ordering" the attack.[391]

4. Causation

Causation is both a jurisdictional requirement and an element of the substantive claim under the state-sponsored terrorism provisions. Like its predecessor, § 1605A(a)(1) states that the injury or death must have been "caused by" one of the listed acts (and that such act was "engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency"). It does not, however, provide a specific standard.

Accordingly, the courts have looked to traditional tort principles from state law and the *Restatement (Second) of Torts*.[392] Both the D.C. and Fourth Circuits have rejected a "but for" interpretation of the

388. 461 F.3d 461, 472 (4th Cir. 2006).

389. *Id.* at 471.

390. *Id.* at 472 n.5.

391. 811 F. Supp. 2d 1, 9–10 (D.D.C. 2011).

392. *See, e.g.*, Stansell v. Republic of Cuba, 217 F. Supp. 3d 320 (D.D.C. 2016); Thuniebat v. Syrian Arab Republic, 167 F. Supp. 3d 22, 47–49 (D.D.C. 2016); Bluth v. Islamic Republic of Iran, 203 F. Supp. 3d 1 (D.D.C. 2016).

"caused by" language found in both § 1605(a)(7) and § 1605A in favor of "proximate cause" or "reasonable connection."[393]

In *Kilburn v. Socialist People's Libyan Arab Jamahiriya,* the D.C. Circuit distinguished the issue of jurisdictional causation under the state-sponsored terrorism exception from the proof necessary to prevail on a substantive cause of action.[394] With regard to the first issue, which may arise on a motion to dismiss, the court of appeals said that proximate cause exists so long as there is "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered."[395]

According to one court, this "traditional test" contains two separate elements: (1) the defendant's conduct "must be a 'substantial factor' in the sequence of events that led to the plaintiff's injury" and (2) the plaintiff's injury "must have been reasonably foreseeable or anticipated as a natural consequence of" the defendant's actions.[396] The proximate-cause requirement, it said, is designed "to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[397]

In *Rux v. Republic of Sudan*, which involved claims against Sudan by the relatives of seventeen U.S. sailors killed in the terrorist bombing of the U.S.S. Cole, the Fourth Circuit found the allegations sufficient to

393. Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1127–28 (D.C. Cir. 2004) (court considered extensively the question of using "but for" versus "proximate cause" for the causation standard); *accord*, Rux v. Republic of Sudan, 461 F.3d 461, 472 (4th Cir. 2006). *See also* Roth v. Syrian Arab Republic, Civ. No. 1:14-cv-01946-RCL, 2018 WL 4680270 (D.D.C. Sept. 28, 2018); Wyatt v. Syrian Arab Republic, 736 F. Supp. 2d 106 (D.D.C. 2010) (proximate cause).

394. 376 F.3d 1123, 1127–29 (D.C. Cir. 2004).

395. *Id.* at 1128–29 (citing Prosser & Keeton on the Law of Torts 263 (5th ed. 1984)). The court reaffirmed this position (and rejected a "specific intent" requirement) in *Owens v. Republic of Sudan*, 864 F.3d 751, 794–99 (D.C. Cir. 2017), *cert. petition docketed*, April 10, 2018.

396. *In re* Terrorist Attacks on Sept. 11, 2001, 298 Supp. 3d 631, 646 (S.D.N.Y. 2018).

397. *Id.* at 646, *citing* Paroline v. United States, 572 U.S. 464 (2014).

satisfy jurisdictional causation.[398] The plaintiffs alleged that Sudan had provided "material support or resources" to the al-Qaeda operatives who planned the attack; Sudan challenged the sufficiency of the specific allegations. The court said that the statute only required the plaintiffs to allege facts "sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damage arising out of a terrorist attack."[399] It noted that at the jurisdictional stage, the "proximate cause" standard "serves simultaneously to weed out the most insubstantial cases without posing too high a hurdle to surmount at a threshold stage of the litigation."[400]

In *Miango v. Democratic Republic of Congo*, the court noted that while § 1608(e) governing default judgments is silent on damages, the D.C. Circuit has held that "a FSIA default winner must prove damages 'in the same manner and to the same extent' as any other default winner."[401] Accordingly, a plaintiff may recover damages for past economic losses if such losses are "reasonably proved," and a plaintiff may recover damages for future harm if the plaintiff proves that the projected consequences are "'reasonably certain' (i.e., more likely than not) to occur" and proves "the amount of damages by a 'reasonable estimate.'"[402]

Additional discussion of theories of recovery for wrongful death, survival, and intentional infliction of emotional distress can be found in *Beer v. Islamic Republic of Iran*.[403]

398. 461 F.3d 461 (4th Cir. 2006).

399. *Id.* at 473. This decision applied § 1605(a)(7).

400. *Id.*

401. 288 F. Supp. 3d 117, 128 (D.D.C. 2018) (*quoting* Hill v. Republic of Iraq, 328 F.3d 680, 683–84 (D.C. Cir. 2003)).

402. 288 F. Supp. 3d at 128.

403. No. 08-cv-1807 (RCL), 2010 WL 5105174, at *11–12 (D.D.C. Dec. 9, 2010). For a discussion of causation under the civil-remedy provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333(a), see *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 507–08 (E.D.N.Y. 2012).

5. Personal injury or death

Section 1605A(a)(1) does not specifically state the elements required for establishing "personal injury or death." In interpreting the provisions, courts have looked to "general principles of tort law," including the *Restatement (Second) of Torts,* as a "proxy for state common law."[404] Courts accordingly describe the harm to plaintiffs as constituting such torts as assault, battery, and intentional infliction of emotional distress.

As the *Valore* court stated, "The FSIA does not restrict the personal injury or death element to injury or death suffered directly by the claimant; instead, such injury or death must merely be the bases [*sic*] of a claim for which money damages are sought."[405] The court therefore found claims were permissible not only for the deaths of the 241 servicemen killed in the attack on the Marine barracks in Beirut and the physical injuries suffered by those who survived the attack, but also for "emotional and financial injury to survivors, decedents, decedent's estates, and decedent's family members."[406]

6. Opportunity to arbitrate

When the act or acts in question took place in the foreign state's territory, the government in question must be given an opportunity to arbitrate the claim before its immunity can be removed under section

404. Bettis v. Islamic Republic of Iran, 315 F.3d 325, 333 (D.C. Cir. 2003). *See also* Baker v. Socialist People's Libyan Arab Jamahirya, 775 F. Supp. 2d 48 (D.D.C. 2011); Heiser v. Islamic Republic of Iran, 659 F. Supp. 2d 20, 24 (D.D.C. 2009) (*Heiser II*) (noting that the application of general principles of tort law is "an approach that in effect looks no different from one that explicitly applies federal common law" but "because these actions arise solely from statutory rights, they are not in theory matters of federal common law").

405. Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 66 (D.D.C. 2010).

406. *Id.* Under § 1605A(c), the estates of covered individuals are permissible plaintiffs. "[S]ection 1605A(a)(1) does not require that the injury to a plaintiff result from the actual 'extrajudicial killing,' but rather from an 'act of extrajudicial killing.' A deadly terrorist act, taken as a whole, clearly constitutes an 'act' of extrajudicial killing." Calderon-Cardona v. Democratic People's Republic of Korea, 723 F. Supp. 2d 441, 459 (D.P.R. 2010).

1605A.[407] In effect, the arbitration provision operates as a type of "exhaustion of remedies" requirement, giving the foreign state an arbitration alternative to litigation in U.S. courts. To date, no state sponsor of terrorism has agreed to such arbitration.

Nonetheless, the statutory requirement must be satisfied. One court found it sufficient that the plaintiff had mailed to the foreign state an offer to arbitrate subject to certain conditions. The conditions included demands that arbitration would be "conducted 'by a third-party organization with extensive experience in arbitrating international disputes' and that the arbitration would 'not require [the plaintiff's] absence from the United States.'"[408] Notably, the plaintiff did not need to make the offer to arbitrate prior to the filing of the compliant.[409]

If the terrorist act in question occurred outside the defendant state, the arbitration requirement does not apply.[410]

7. Damages

The terrorism exception only provides for money damages. Although section 1606 of the FSIA generally prohibits the award or recovery of punitive or noncompensatory damages against foreign states (but not their agencies or instrumentalities), § 1605A(c)(4) explicitly permits such damage awards. It provides that money damages against foreign states as well as their officials, employees, and agents may include "economic damages, solatium, pain and suffering, and punitive damages."[411]

407. 28 U.S.C. § 1605A(a)(2)(A)(iii) (2010). *See* Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 44 (D.D.C. 2000) (act occurred inside Iraq and the plaintiffs properly offered to arbitrate).

408. Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230, 232 (D.C. Cir. 2003).

409. *Id.* at 233.

410. *See* Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1123 (9th Cir. 2010); Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51 (D.D.C. 2010).

411. *See* Roth v. Syrian Arab Republic, Civ. No. 1:14-cv-01946-RCL, 2018 WL 4680270 (D.D.C. Sept. 28, 2018). Survivors of an attack may recover compensatory damages for pain and suffering; family members may recover solatium for emotional injury.

While § 1605A(a) provides a federal "cause of action," it does not specify criteria for determining the amount of damages. Accordingly, the courts have looked to general principles of tort law.[412] The U.S. District Court for the District of Columbia has adopted a standardized approach for calculating various categories of damages in state-sponsored terrorism cases.[413]

Punitive damages are awarded both to punish defendants and to deter future terrorist acts. In calculating those damages, courts have generally looked to four factors:

1. the character of the defendants' act;
2. the nature and extent of harm to the plaintiffs;
3. the need for deterrence; and
4. the wealth of the defendants.[414]

Some courts impose a fixed amount, some apply a "multiplier" of the defendants' annual expenditure on terrorism, and some calculate the award based on a ratio between the compensatory damages and the punitive damages.[415]

In *Beer v. Islamic Republic of Iran*, then-Chief Judge Lamberth evaluated and sustained the "*Flatow* Method" in light of recent U.S. Supreme Court decisions.[416] His decision in large part rested on determinations that foreign states do not enjoy the same "due process" protections as individuals do under the U.S. Constitution.[417]

412. Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64 (D.D.C. 2017).

413. *See* Fain v. Islamic Republic of Iran, 885 F. Supp. 2d 78 (D.D.C. 2012).

414. Bluth v. Islamic Republic of Iran, 203 F. Supp. 3d 1 (D.D.C. 2016); Thuniebat v. Syrian Arab Republic, 167 F. Supp. 3d 22, 53–54 (D.D.C. 2016); Wamai v. Republic of Sudan, 60 F. Supp. 3d 84, 92 (D.D.C. 2014).

415. *See*, *e.g.,* Cohen v. Islamic Republic of Iran, 238 F. Supp. 3d 71 (D.D.C. 2017).

416. 789 F. Supp. 2d 14, 18 (D.D.C. 2011) ("In awarding damages following passage of the NDAA, courts have generally identified the *Flatow* Method as the procedure that best serves the retribution and deterrence interests that Congress sought to promote in enacting the 2008 Amendments."); *cf.* Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64 (D.D.C. 2017).

417. *Beer*, 789 F. Supp. 2d at 20–22.

Since the same terrorist incident may give rise to multiple claims under § 1605A, it is possible that a given defendant might be subject to multiple punitive damage awards for the same conduct. This possibility was addressed in *Murphy v. Islamic Republic of Iran*, where the court expressed concern about "over-punishing the same conduct through repeated [punitive damage] awards with little additional deterrent effect" but concluded that "when punitive damages are personal to plaintiffs in a given case, they are not necessarily excessive when awarded in a subsequent case, even arising out of the same fact, if the subsequent case involves different plaintiffs."[418]

In *Owens*, the D.C. Circuit held that although § 1605A(c) operates retroactively in the sense that the cause of action applies to pre-enactment conduct, it does not authorize the award of punitive damages for such conduct.[419]

8. Application of § 1605A to prior suits

Cases filed after the effective date of the statute (January 28, 2008) must of course be considered on that basis alone. However, § 1605A was intended to have at least some retroactive effect. The specific provisions are complicated.[420]

If a party had filed a claim, but did not obtain relief under the previous statute (§ 1605(a)(7)), the party could claim the benefits of new § 1605A by filing a motion to convert its pending case to a new action under § 1605A.[421] These have been called "prior actions." The deadline

418. 740 F. Supp. 2d 51, 81–82 (D.D.C. 2010).

419. Owens v. Republic of Sudan, 864 F.3d 751, 812–17 (D.C. Cir. 2017), relying on Landgraf v. USI Film Prods., 511 U.S. 244 (1994). The same conclusion was reached for punitive damages under state law.

420. For a comprehensive review, see *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31 (D.D.C. 2009). *See also* Simon v. Republic of Iraq, 529 F.3d 1187, 1191 (D.C. Cir. 2008), *rev'd on other grounds sub nom.* Republic of Iraq v. Beaty, 556 U.S. 848 (2009) ("[T]he new terrorism exception in § 1605A by its terms does not provide a substitute basis for jurisdiction over all cases pending under § 1605(a)(7) when § 1605A replaced it.").

421. Section 1083(c)(2) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083, 122 Stat. 3, defined a "prior action" as one

for filing them was sixty days after the effective date of the statute, that is, March 28, 2008.

Alternatively, plaintiffs whose actions had been timely commenced under the prior statute and were pending or had gone to judgment when the new provision went into effect were permitted to refile under § 1605A under certain circumstances. These suits were termed "related actions."[422] Plaintiffs relying on this provision must have sought the benefits of the new statute not later than sixty days after the date of the entry of judgment in the original action or January 28, 2008, whichever was later.[423]

The extent to which a court may take judicial notice of prior findings of fact in related proceedings before the same court has been addressed in several decisions. In *Oveissi v. Islamic Republic of Iran*, for example, then-Chief Judge Lamberth said that "a FSIA court may 'take judicial notice of related proceedings and records in cases before the same court.'"[424]

in which the action (a) was brought under § 1605(a)(7) before January 28, 2008; (b) relied upon § 1605(a)(7) as creating a cause of action; (c) was adversely affected on the grounds that the provision failed to create a cause of action against the state; and (d) as of January 28, 2008, was before the courts in "any form."

422. § 1083(c)(3). A related action is any "action arising out of the same act or incident" that was timely commenced under § 1605(a)(7). *See generally* Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1 (D.D.C. 2011).

423. § 1083(c)(3). *Taylor v. Islamic Republic of Iran,* 811 F. Supp. 2d 1 (D.D.C. 2011), provides an example of a related action. For a comprehensive review of the issues, see *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31 (D.D.C. 2009) (no *res judicata* effect for prior actions). *See also* Simon v. Republic of Iraq, 529 F.3d 1187, 1191 (D.C. Cir. 2008), *rev'd sub nom.* Republic of Iraq v. Beaty, 556 U.S. 848 (2009).

424. 879 F. Supp. 2d 44, 49 (D.D.C. 2012) (quoting Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 59 (D.D.C. 2010)). *See also* Akins v. Islamic Republic of Iran, No. 17-675 (BAH), 2018 WL 4308584 (D.D.C. Sept. 10, 2018); Roth v. Syrian Arab Republic, Civ. No. 1:14-cv-01946-RCL, 2018 WL 4680270 (D.D.C. Sept. 28, 2018); Shoham v. Islamic Republic of Iran, No. 12-cv-508 (RCL), 2017 WL 2399454 (D.D.C. June 1, 2017).

9. Challenges to the legality of the exception

Defendants have repeatedly argued that the terrorism exception is unconstitutional, and courts have repeatedly rejected the claims. In *Wyatt v. Syrian Arab Republic*, for example, the court denied the defendant's claim that the exception "'exposes' the final judgments of Article III courts to potential rescission by the president and Congress, thereby violating the separation of powers between the judicial and political branches."[425]

Defendants have also argued that the terrorism exception violates international law. The D.C. Circuit has rejected the contention that the exception violates the United Nations Charter by abrogating foreign sovereign immunity for those states designated as sponsors of terrorism and thereby denies such states "equality with others in violation of Article 2.1 of the United Nations Charter."[426]

In *Gates v. Syrian Arab Republic*, the court rejected the defendant government's claim that the executive branch's designation of a state as a sponsor of terrorism, which constitutes a critical element of the abrogation of sovereign immunity under the statute, inherently constitutes a non-justiciable "political question" under *Baker v. Carr*.[427]

D. Execution of Judgments in § 1605A Cases

Many of the judgments rendered under the terrorism exception have been substantial, sometimes exceeding $100 million.[428] Most have been

425. 736 F. Supp. 2d 106, 113 (D.D.C. 2010). *See also* Wultz v. Islamic Republic of Iran, No. 08-cv-1460 (RCL), 2010 WL 4190277, at *3 (D.D.C. Oct. 20. 2010); Gates v. Syrian Arab Republic, 646 F. Supp. 2d 79 (D.D.C. 2009); Owens v. Republic of Sudan, 531 F.3d 884 (D.C. Cir. 2008) (addressing claim that terrorism exception was an unconstitutional delegation of power).

426. Wyatt v. Syrian Arab Republic, 266 F. App'x 1 (D.C. Cir. 2008).

427. 646 F. Supp. 2d at 87–88; Baker v. Carr, 369 U.S. 186 (1962).

428. *E.g.,* Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15, 31–32 (D.D.C. 2008) ($300 million in punitive damages); Beer v. Islamic Republic of Iran, 789 F. Supp. 2d 14, 26 (D.D.C. 2011) ($300 million in punitive damages); Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24, 42 (D.D.C. 2012) ($300 million in punitive damages); Wyatt v. Syrian Arab Republic, 908 F. Supp. 2d 216, 233 (D.D.C. 2012) ($300 million in punitive damages).

default judgments. And most have remained unsatisfied. Despite the FSIA's specific provisions concerning the enforcement of terrorism judgments against state sponsors, successful plaintiffs have had great difficulty with actual execution.[429] Problems result partly from the restrictive provisions of the law itself, but more generally from the fact that designated state sponsors of terrorism have taken steps to minimize or eliminate any property or assets in the United States that might be subject to execution.

In response, the FSIA has been amended several times with regard to judgments against state sponsors of terrorism, and several separate but related statutes have also been enacted. This section provides a description of these developments and the specific issues relating to the enforcement of judgments rendered in cases brought under § 1605A. These issues are discussed within the context of the FSIA's broader provisions concerning attachment and execution of judgments against foreign states and their agencies and instrumentalities, and in light of successive statutory amendments. With a changing legislative framework (which has in turn stimulated various judicial interpretations), this area of law remains complicated and continues to evolve.[430]

1. Generally

Under the FSIA, the property of a foreign state (including its agencies and instrumentalities) in the United States is presumptively immune, and the lack (or waiver) of immunity of the state from jurisdiction under the FSIA does not guarantee that a resulting judgment will be en-

429. *See In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009), where the court concluded that "civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy. . . . The cases do not achieve justice for victims, are not sustainable, and threaten to undermine the President's foreign policy initiatives." (To support this assertion, the court noted that at the time of the decision, there were $45 million of Iranian assets in the United States and over $10 billion in outstanding court judgments.)

430. *See generally* Restatement (Fourth) of Foreign Relations Law § 464, Reporters' Note 10 (Am. Law Inst. 2018).

forceable against the foreign state's assets. This is true because the statute provides broader immunity from execution than from jurisdiction. Under § 1609, even if a valid judgment has been entered, the property of a foreign state (or its agencies and instrumentalities) remains immune and can only be subject to attachment and execution as specifically provided in §§ 1610 and 1611.

Accordingly, the burden remains on the judgment creditor to demonstrate that specific property is subject to attachment or execution. Limited discovery may be allowed to aid in the execution of judgments against foreign state property, but only with regard to *specific* property believed to be subject to attachment.[431]

2. Protected properties

Section 1610 sets out the rules regarding attachment and execution, and they are discussed in detail in this section. However, additional limitations apply. Specifically, § 1611 exempts certain categories of property from those rules. These categories include

1. the property of international organizations that have been designated under the International Organizations Immunities Act;[432]
2. the property of a foreign central bank held for its own account (as well as funds held in the name of a central bank or monetary authority);[433]

431. Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011) (general asset discovery order incompatible with FSIA; plaintiffs must identify specific property subject to attachment and plausibly allege an exception to § 1609).

432. 28 U.S.C. § 1611(a) (1996) (not subject to "attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States"). The International Organizations Immunities Act (IOIA), Dec. 29, 1945, ch. 652, Title I, 59 Stat. 669, is codified at 22 U.S.C. § 288–288*l*. The list of organizations designated under the IOIA can be found at 22 U.S.C. § 288 note.

433. 28 U.S.C. § 1611(b)(1).

3. property of a military character or used for a military activity;[434] and
4. in actions brought under § 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, a facility or installation used by an accredited diplomatic mission for official purposes.[435]

In addition, certain types of property are protected by the operation of other rules. For example, foreign embassies, consulates, and other missions, along with their bank accounts, are generally immune and inviolable under the Vienna Conventions on Diplomatic Relations and Consular Relations.[436]

3. Section 1610

When the state-sponsored terrorism exception to jurisdiction in § 1605(a)(7) was initially adopted in 1996, a parallel provision was included regarding enforcement of judgments rendered under that section. Thus, § 1610(a)(7) was added to permit execution of judgments related to claims for which *foreign states* were no longer immune under the new provision, but it allowed execution only against property of that state used for commercial purposes in the United States "regardless of whether the property in question was involved with the act on

434. 28 U.S.C. § 1611(b)(2).

435. 28 U.S.C. § 1611(c).

436. Under Article 22 of the 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972), the premises of the mission are inviolable and are (together with their furnishings and other property) immune from search, requisition, attachment, or execution. More limited protections are provided for consular premises and property under the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force for the United States Dec. 24, 1969).

which the claim was based."[437] Under the amended § 1610(b)(2), property in the United States of an *agency or instrumentality* of a foreign state engaged in commercial activity in the United States was no longer entitled to immunity from execution, or attachment in aid of execution, upon a U.S. judgment relating to a claim for which that agency or instrumentality was not immune by virtue of §§ 1605(a)(7). This was true regardless of whether the property was "involved in the act" upon which the claim was based at any time.

In addition, the 1996 amendments included a provision permitting execution against frozen or diplomatic assets of state sponsors of terrorism. Section 1610(f)(1) provided that, notwithstanding any other provision of law, "any property with respect to which financial transactions are prohibited or regulated" under various statutory authorities, including the Trading With the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA), was made subject to execution to satisfy any judgment relating to a claim for which a foreign state or its agency or instrumentality was not immune under § 1605(a)(7).[438] However, recognizing that such execution could

437. Pub. L. No. 104-132, § 221(b), 110 Stat. 1214 (April 24, 1996). The commercial property exception under § 1610(a)(7) only applies when the foreign sovereign itself engages in the relevant commercial activity. *See* Rubin v. Islamic Republic of Iran, 456 F. Supp. 2d 228, 234 (D. Mass. 2006).

438. Specifically, 28 U.S.C. § 1610(f)(1)(A) (2010) stated:

> Notwithstanding any other provision of law . . . any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or [*sic*] such state) claiming such property is not immune under § 1605(a)(7) (as in effect before the enactment of section 1605A) or 1605A.

The introductory "notwithstanding any other provision of law" phrase was determined to override any immunity provided in the FSIA but not other sanctions

cause significant foreign policy issues, the amendments also explicitly authorized the President, in the interests of national security, to waive that provision, which he did right after it was enacted.[439] Section 1610(f)(1) has never become operative.

4. Terrorism Risk Insurance Act (TRIA)

Despite these 1996 amendments, most plaintiffs with judgments against state sponsors of terrorism remained unable to obtain satisfaction because (a) the states in question typically did not engage in commercial activity in the United States and (b) any assets they might have had in the United States were typically seized or frozen as a result of government sanctions.

To overcome this hurdle, Congress subsequently enacted the Terrorism Risk Insurance Act of 2002 (TRIA). TRIA created a temporary federal program of "shared public and private compensation for insured losses resulting from acts of terrorism," and (in § 201) specifically allowed for attachment and execution of terrorism judgments for compensatory damages against the "blocked assets of the terrorist party" (including those of its agencies and instrumentalities) which might otherwise have been immune.[440]

regimes (such as the Cuban Assets Control Regulations) or state law. *See, e.g.*, Calderon-Cardona v. JPMorgan Chase Bank, N.A., 867 F. Supp. 2d 389 (S.D.N.Y. 2011).

439. 28 U.S.C. § 1610(f)(3); Pres. Determ. No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). *See also* Pres. Determ. No. 2001-03, 63 Fed. Reg. 66,483 (Oct. 28, 2000).

440. Pub. L. No. 107-297, §§ 101(b) and 201(a), 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note). Specifically, § 201(a) stated:

> Notwithstanding any other provision of law, . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, . . . the blocked assets of the terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

See Jerez v. Republic of Cuba, 777 F. Supp. 2d 6 (D.D.C. 2011). TRIA's constitutionality was upheld in *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010), *cert. denied sub nom.* Bank Melli Iran New York Representative Office v.

The simplicity of this formulation is misleading. Each of these elements is further defined in the statute, the relevant provisions have subsequently been amended, and their application has been the subject of continuing judicial interpretation, making this (to say the least) a challenging area to summarize.

TRIA defined the term "terrorist party" to mean "a terrorist, a terrorist organization . . . or a foreign state designated as a state sponsor of terrorism."[441] Moreover, the enforcement of judgments provision only applied in cases based on (a) an "act of terrorism" or (b) an act for which the terrorist party lacks immunity under § 1605(a)(7).[442] These are separate requirements. The term "act of terrorism" was defined somewhat confusingly to mean either (a) any act certified by the Secretary of the Treasury, in conjunction with the Secretary of State and the Attorney General, as provided in § 102 of the statute[443] or (b) to the extent not covered by the preceding clause, any terrorist activity falling within the definition of terrorist activities, excluding certain classes of aliens under the Immigration and Nationality Act (INA).[444] Violence that fails to meet the criteria in one or the other definition does not qualify as an "act of terrorism" for TRIA purposes.[445]

Finally, TRIA defined the term "blocked assets" to include, in pertinent part, "any asset seized or frozen by the United States" under the

Weinstein, 133 S. Ct. 21 (2012). Section 201(a) also created an independent jurisdictional basis for post-judgment execution and attachment proceedings against property held by an agency or instrumentality of a terrorist party even if that agency or instrumentality is not named in the judgment. *See* Kirschenbaum v. 650 Fifth Ave. & Related Props., 830 F.3d 107, 132 (2d Cir. 2016).

441. Pub. L. No. 107-297, § 201(d)(4). "Terrorist organization" has the meaning specified in § 212(a)(3)(B)(vi) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(vi). The "designation" must be one under § 6(j) of the Export Administration Act of 1979 (now codified at 50 U.S.C. § 4605) or § 620A of the Foreign Assistance Act of 1961 (codified at 22 U.S.C. § 2371).

442. Pub. L. No. 107-297, § 201(a).

443. *See* TRIA § 102(1) (codified as a note to 15 U.S.C. § 6701).

444. Specifically, those under INA § 212(a)(3)(B)(iii) (codified at 8 U.S.C. § 1182(a)(3)(B)(iii)).

445. Jerez v. Republic of Cuba, 777 F. Supp. 2d 6, 29 (D.D.C. 2011).

authority of relevant sections of the Trading With the Enemy Act (TWEA) or the International Emergency Economic Powers Act (IEEPA).[446] At the same time, it explicitly excluded property subject to a license issued by the U.S. government under IEEPA or the United Nations Participation Act.[447]

For several reasons, these TRIA provisions were less than effective. Generally, determining whether particular assets are blocked requires reference to Office of Foreign Assets Control (OFAC) regulations.[448] When they are blocked, transactions in those assets are prohibited, and the assets may thus not be available to judgment creditors of state sponsors of terrorism regardless of any sovereign immunity shield. When transactions have been licensed, the assets are "unblocked" to the extent of the license and thus by definition outside of TRIA § 201.[449]

One purpose of TRIA, of course, was to override OFAC's regulations and permit attachment and execution even when no OFAC license had been issued. In any event, few assets of state sponsors of terrorism that could be blocked remain in the United States. Moreover, TRIA excluded property used exclusively for diplomatic or consular

446. § 201(d)(2)(A), 116 Stat. at 2339. The specific provisions are § 5(b) of the Trading With the Enemy Act (formerly 50 app. U.S.C.A. § 5(b), now 50 U.S.C. § 4305(b)) and § 202 or 203 of the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701 and 1702).

447. § 201(d)(2)(B)(i). The UN Participation Act of 1945, 59 Stat. 619, is codified at 22 U.S.C. § 287–287e-3.

448. Sanctions under TWEA and IEEPA are administered by the Office of Foreign Assets Control (OFAC) in the U.S. Department of the Treasury. A general description of OFAC, its authorities, and its functions can be found at http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx.

449. Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9 n.6 (D.D.C. 2011) (*Heiser III*). In *Weinstein v. Islamic Republic of Ira*n, 299 F. Supp. 2d 63, 75 (S.D.N.Y. 2004), the court rejected the argument that the term "blocked assets" includes all assets "regulated" or "licensed" under IEEPA by OFAC. In *Doe v. Morgan Chase Bank, N.A.*, 899 F.3d 152 (2d Cir. 2018), electronic funds transfers initiated by foreign terrorist organizations and blocked pursuant to TRIA were held not subject to attachment and execution.

purposes and thus entitled to immunity and inviolability under the Vienna Conventions.[450] As a result, the practical impact of TRIA was limited.

5. Post-TRIA legislation

When the FSIA was further amended in 2008 to replace § 1605(a)(7) with § 1605A, additional modifications were made with respect to judgments.[451] The most important changes were made by adoption of § 1610(g), in which Congress further expanded the category of property subject to attachment for cases involving state sponsors.

The first major change was to eliminate (for judgment purposes) the distinction between the state itself and its agencies or instrumentalities. Thus, § 1610(g)(1) provides that both the property of a foreign state against which a judgment is entered under § 1605A *and* the property of an agency or instrumentality of such a state (including "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity") are subject to attachment and execution.[452]

In addition, the statute states that this amenability to execution is to be determined *regardless of*

> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;

450. § 201(d)(2)(B)(ii). These terms were further defined in § 201(d)(3). Execution is not permitted against diplomatic and consular property being used for those purposes. Bennett v. Islamic Republic of Iran, 618 F.3d 19 (D.C. Cir. 2010); Wyatt v. Syrian Arab Republic, 83 F. Supp. 3d 192 (D.D.C. 2015).

451. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A).

452. This provision was an apparent effort to limit the effect of the decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). *Cf.* Kirschenbaum v. 650 Fifth Avenue, 257 F. Supp. 3d 463, 528 (S.D.N.Y. 2017). Section 1610(g)(1) authorizes the attachment of the property of a foreign state, and thus its application turns on the issue of ownership, which is generally a question of state law. *See* Levin v. JPMorgan Chase Bank, N.A., No. 17-3854-cv, 2018 WL 4901585 (2d Cir. Oct. 9, 2018).

> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.[453]

The property must still be used in commercial activity, but the distinction between states and their agencies and instrumentalities is attenuated. Judgment creditors proceeding under § 1610(g)(1) must nonetheless establish that the entity in question meets the requirements of "agency or instrumentality."[454]

The 2008 amendment's second change addressed the issue of blocked assets. Under § 1610(g)(2), the fact that the U.S. government has regulated the property in some way, such as through enforcement under the Trading with the Enemy Act or the International Emergency Economic Powers Act, does not shield it from execution.

Finally, in an evident effort to provide a measure of protection to uninvolved third parties with interests in the property in question, § 1610(g)(3) reserved the authority of a court to "prevent appropriately the impairment of an interest held by a person who is not liable" in the underlying action under § 1605A that gives rise to the judgment in question.[455]

In *Rubin v. Islamic Republic of Iran*,[456] the Supreme Court held that § 1610(g) does not provide a "freestanding basis" for holding judgments under § 1605A to attach and execute against the property of a foreign state, nor was it intended to divest all property of a foreign state

453. § 1610(g)(1).

454. *See, e.g., Heiser III*, 807 F. Supp. 2d at 9.

455. As stated by Chief Judge Lamberth in *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 443 (D.D.C. 2012) (*Heiser IV*), section 1610(g)(3) "provides courts with the important power to protect interests held by third-parties where Iran has some ownership of a property."

456. 138 S. Ct. 816 (2018), *affirming* Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016).

or its agencies and instrumentalities of their immunity. "Section 1601(g) serves to identify property that will be available for attachment and execution in satisfaction of a § 1605A judgment, but it does not in itself divest property of immunity. Rather, . . . § 1610(g) operates only when the property at issue is exempt from immunity as provided elsewhere in § 1610."[457]

E. Justice Against Sponsors of Terrorism Act (JASTA)

In 2016, Congress enacted a new exception to foreign sovereign immunity for domestic instances of "international terrorism." The Justice Against Sponsors of Terrorism Act[458] (JASTA) is codified at 28 U.S.C. § 1605B and provides jurisdiction over *any* foreign state

> in any case in which money damages are sought . . . for physical injury to person or property or death occurring in the United States and caused by
>
> (1) an act of international terrorism in the United States; and
>
> (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless [of] where the tortious act or acts of the foreign state occurred.[459]

Jurisdiction thus rests on four elements: (1) physical injury to person or property or death occurring in the United States; (2) an act of international terrorism in the United States *and* a tortious act or acts by a foreign state or any official, employee, or agent of that state taken while acting within the scope of that person's office, employment, or agency; (3) causation; and (4) physical injury or death or damage to property in the United States.[460]

JASTA is therefore both broader and narrower than § 1605A. While it permits courts to consider cases against states that were not formally designated as "state sponsors of terrorism" at the time of the

457. 138 S. Ct. at 820.

458. Pub. L. No. 114–222, 130 Stat. 852 (2016).

459. 28 U.S.C. § 1605B(b).

460. See discussion in *In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631, 642–46 (S.D.N.Y. 2018).

acts in question, it is limited to "acts of international terrorism" that have occurred in the United States.

Moreover, it broadens the substantive basis for the suit to include "tortious acts"—whether committed in the United States or elsewhere—and thereby in effect expands the "noncommercial tort" exception by eliminating the "entire tort" rule but only with respect to a narrow class of cases (acts of terrorism occurring in the United States).

JASTA does not define what acts are "tortious" for these purposes but clearly contemplates that liability can arise from acts of the sovereign's agents as well as its officers and employees. It thus engages principles of vicarious liability, which will presumably be resolved by reference to state and local law, even though the torts in question will have arisen from acts of foreign government officials and individuals while acting abroad within the scope of their respective office, employment, or agency relationships with the government in question.

As to causation, it seems established that the standard for "jurisdictional causation" under the statute is necessarily lower than that for determining substantive causation at the merits stage.[461] For jurisdictional purposes, the standard has been interpreted to mean "reasonable connection" rather than "but for" causation.[462]

Other interpretive issues, however, remain to be resolved.[463] In this regard, it is noteworthy that JASTA included the following statement:

> The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wher-

461. *In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1750 (GBD)(FM), 2017 WL 8639919 (S.D.N.Y. Nov. 9, 2017).

462. *In re Terrorist Attacks*, 298 F. Supp. 3d at 644–46 (also addressing the "vicarious liability" of other associated entities in light of the *Bancec* presumption at *id.* at 631, 655–57).

463. Some constitutional challenges to JASTA, based on its alleged violation of the separation of powers doctrine and its retroactive application to a decided case, have been rejected. *See In re* Terrorist Attacks, 298 F. Supp. 3d at 660–61; *In re* Terrorist Attacks on Sept. 11, 2001, No. 03 MDL 1570 (GBD) (FM), 2017 WL 8639919, at *75–76 (S.D.N.Y. Nov. 9, 2017).

> ever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.[464]

Here, it is important to note that, in addition to creating a new exception to the FSIA, JASTA expanded the civil liability provisions of the Anti-Terrorism Act to permit suits against "any person who aids and abets, by knowingly providing substantial assistance [to], or who conspires with the person who committed such an act of international terrorism" that resulted in harm to a plaintiff.[465]

Congress specified that the "proper legal framework for how [aiding and abetting] liability should function" under the ATA is that identified in *Halberstam v. Welch*.[466] In that decision, the District of Columbia Circuit observed that in the civil context, aiding and abetting liability requires proof of three elements: (1) "the party whom the defendant aids must perform a wrongful act that causes an injury," (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance," and (3) "the defendant must knowingly and substantially assist the principal violation."[467]

Exactly how these expanded concepts of aiding and abetting (or secondary) liability will apply in the context of material support for acts of international terrorism remains to be determined.[468]

464. Pub. L. No. 114-222 § 2(b).

465. *Id.* § 4(a), 18 U.S.C. § 2333(d)(2). Initially, the ATA afforded civil relief only against the principals perpetrating acts of international terrorism. It provided no civil action against secondary actors who, while not committing international terrorist acts themselves, facilitated such acts by others. *See* Rothstein v. UBS AG, 708 F.3d 82, 97 (2d Cir. 2013) (holding that ATA's "statutory silence on the subject of secondary liability means there is none"); *accord, In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118, 123–24 (2d Cir. 2013); Owens v. Bank Paribas S.A., 235 F. Supp. 3d 85, 91–95 (D.D.C. 2017).

466. *Halberstam*, 705 F.2d 472 (D.C. Cir. 1983).

467. *Id.* at 487. Pub. L. No. 114-222 § 2(a)(5), specifying *Halberstam.*

468. *See* Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018); Freeman v. HSBC Holdings PLC, 2018 WL 3616845 (E.D.N.Y. July 27, 2018). Taamneh v. Twitter, Inc., 2018 WL 5729232 (N.D. Cal. Oct. 29, 2018).

Table of Authorities

Cases

767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire, 988 F.2d 295 (2d Cir. 1993), 11

Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012), 49, 66, 68

Abelesz v. OTP Bank, 692 F.3d 661 (7th Cir. 2012), 31

Aboeid v. Saudi Arabian Airlines, Inc., No. CV-10-2518 (SJ)(VVP), 2011 WL 2222140 (E.D.N.Y. June 1, 2011), 30

Abur v. Republic of Sudan, 437 F. Supp. 2d 166 (D.D.C. 2006), 72

Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15 (D.D.C. 2008), 104

Acree v. Republic of Iraq, 271 F. Supp. 2d 179 (D.D.C. 2003), 101

Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004), 102, 108

Adler v. Federal Republic of Nigeria, 107 F.3d 720 (9th Cir. 1997), 63

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007), 93

Af-Cap Inc. v. Republic of Congo, 462 F.3d 417 (5th Cir. 2006), 49, 89

Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934 (D.C. Cir. 2008), 13, 27, 48, 68, 70

Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 798 F. Supp. 2d 260 (D.D.C. 2011), 86

Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 128 F. Supp. 3d 242 (D.D.C. 2015), 89

Akins v. Islamic Republic of Iran, No. 17-675 (BAH), 2018 WL 4308584 (D.D.C. Sept. 10, 2018), 108, 125

Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250 (7th Cir. 1983), 106

Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999), 83, 84

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), 5

All Am. Trading Corp. v. Cuartel General Fuerza Aerea Guardia Nacional de Nicaragua, 818 F. Supp. 1552 (S.D. Fla. 1993), 85

Amduso v. Republic of Sudan, 288 F. Supp. 3d 90 (D.D.C. 2017), 89

Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamosostek (Persero), 600 F.3d 171 (2d Cir. 2010), 53

Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279 (11th Cir. 1999), 24

Arch Trading Corp. v. Republic of Ecuador, No. 13 cv 4445 (PAC), 2015 WL 3443906 (S.D.N.Y. May 28, 2015), *aff'd,* 839 F.3d 193 (2d Cir. 2016), 26, 28

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), 1, 5, 10, 48, 72, 74

Ashcroft v. Iqbal, 556 U.S. 662 (2009), 26

Atkinson v. Inter-American Development Bank, 156 F.3d 1335 (D.D.C. 1998), 12

Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir.), *cert. denied,* 137 S. Ct. 493 (2016), 25, 31, 59, 63

Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009), 92, 93, 94

Autotech Techs. v. Integral Research & Dev., 499 F.3d 737 (7th Cir. 2007), 89

Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (D.D.C. 2018), 23, 26, 62, 63, 77

BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin., 884 F.3d 463 (4th Cir. 2018), *cert. denied*, No. 18-19, 2018 WL 3241795 (U.S. Sup. Ct. Oct. 1, 2018), 48, 49

Baker v. Carr, 369 U.S. 186 (1962), 14, 126

Baker v. Socialist People's Libyan Arab Jamahirya, 775 F. Supp. 2d 48 (D.D.C. 2011), 105, 121

Balkan Energy Ltd. v. Republic of Ghana, 302 F. Supp. 3d 144 (D.D.C. 2018), 23, 77

Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003), 82

Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964), 14

Bank Melli Iran New York Representative Office v. Weinstein, 133 S. Ct. 21 (2012), 132

Barapind v. Government of Republic of India, 844 F.3d 824 (9th Cir. 2016), 49

Barot v. Embassy of the Republic of Zambia, 785 F.3d 26 (D.C. Cir. 2015), 19

Batra v. State Bank of India, No. 15 Civ. 2678 (CGS), 2016 WL 3029957 (S.D.N.Y. May 25, 2016), 54

Baylay v. Etihad Airways P.J.S.C., 881 F.3d 1032 (7th Cir. 2018), *cert. denied,* 139 S. Ct. 175 (2018), 24

BCB Holdings Ltd. v. Government of Belize, 232 F. Supp. 3d 28 (D.D.C. 2017), 22

Beer v. Islamic Republic of Iran, 789 F. Supp. 2d 14 (D.D.C. 2011), 120, 123, 126

Beer v. Islamic Republic of Iran, No. 08-cv-1807 (RCL), 2010 WL 5105174 (D.D.C. Dec. 9, 2010), 117, 120

Belhas v. Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008), 44

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), 26

Bell Helicopter Textron Inc. v. Islamic Republic of Iran, 892 F. Supp. 2d 219 (D.D.C. 2012), 2

Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 734 F.3d 1175 (D.C. Cir. 2013), 63

Ben-Haim v. Edri, No. 15-3877 (JLL), 2015 WL 12839772 (D.N.J. Oct. 1, 2015), 35

Bennett v. Islamic Republic of Iran, 618 F.3d 19 (D.C. Cir. 2010), 134

Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), *abrogated by* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018), 83

Best Med. Belgium, Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230 (E.D. Va. 2012), 55, 67

Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003), 104, 113, 121

Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183 (10th Cir. 2008), 59

Birch Shipping Corp. v. Embassy of United Republic of Tanzania, 507 F. Supp. 311 (D.D.C. 1980), 75

Bluth v. Islamic Republic of Iran, 203 F. Supp. 3d 1 (D.D.C. 2016), 118, 123

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017), 6, 7, 26, 27, 64

Bolivarian Republic of Venezuela, No. 15-423, 2016 WL 4524346 (U.S.) (Appellate Brief) (Aug. 26, 2016), 27

Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64 (D.D.C. 2017), 31, 123

Butters v. Vance Int'l, Inc., 225 F.3d 462 (4th Cir. 2000), 44

Cabiri v. Government of the Republic of Ghana, 165 F.3d 193 (2d Cir. 1999), 71

Calderon-Cardona v. Democratic People's Republic of Korea, 723 F. Supp. 2d 441 (D.P.R. 2010), 121

Calderon-Cardona v. JPMorgan Chase Bank, N.A., 867 F. Supp. 2d 389 (S.D.N.Y. 2011), 131

California Dep't of Water Resources v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008), 42

Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258 (D.D.C. 2003), 114

Can-Am Int'l, LLC v. Republic of Trinidad & Tobago, 169 F. App'x 396 (5th Cir. 2006), 59

CapitalKeys, LLC v. Democratic Republic of Congo, 278 F. Supp. 3d 265 (D.D.C. 2017), 41

Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012 (2d Cir. 1993), 91

Carpenter v. Republic of Chile, 610 F.3d 776 (2d Cir. 2010), 48

Cassirer v. Kingdom of Spain, 580 F.3d 1048 (9th Cir. 2009), *aff'd in part on reh'g en banc*, 616 F.3d 1019 (2010), *cert. denied*, 131 S. Ct. 3057 (2011), 2, 68, 69

Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951 (9th Cir. 2017), *cert. denied,* 138 S. Ct. 1992 (2018), 13, 24

Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, No. C-07-5944 JST, ECF Nos. 5183, 5215, 2018 WL 659084 (N.D. Cal. Feb. 1, 2018), 27

Chettri v. Nepal Rastra Bank, 834 F.3d 50 (2d Cir. 2016), 18, 55, 66

Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990), 44, 106

Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994), 56

Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004), 102, 108

Cohen v. Islamic Republic of Iran, 238 F. Supp. 3d 71 (D.D.C. 2017), 109, 123

Community Fin. Group, Inc. v. Republic of Kenya, 663 F.3d 977 (8th Cir. 2011), 55

Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Fed'n, 361 F.3d 676 (2d Cir. 2004), 35

Comparelli v. Republica Bolivariana De Venezuela, 891 F.3d 1311 (11th Cir. 2018), 67

Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002), 93

Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion, 832 F.3d 92 (2d Cir. 2016), *cert. dismissed*, 137 S. Ct. 1622 (2017), 21, 22, 23

Cruise Connections Charter 1, LP v. Attorney Gen. of Canada, 600 F.3d 661 (D.C. Cir. 2010), 60, 62

Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, C.A. No. 17-mc-151-LPS, 2018 WL 3812153 (D. Del. Aug. 10, 2018), 38, 92

Crystallex Int'l Corp. v. Venezuela, 251 F. Supp. 3d 758 (D. Del. 2017), 58, 60, 62

Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38 (D.D.C. 2000), 122

De Csepel v. Federal Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017), *petition for cert. docketed,* No. 17-1165 (Feb. 16, 2018), 11, 31, 32, 65, 67, 70

De Csepel v. Republic of Hungary, 714 F.3d 591 (D.C. Cir. 2013), 53

De Csepel v. Republic of Hungary, 808 F. Supp. 2d 113 (D.D.C. 2011), *aff'd in part,* 714 F.3d 591 (D.C. Cir. 2013), 28, 67

De Sanchez v. Banco Cent. De Nicaragua, 770 F.2d 1385 (5th Cir. 1985), 68, 106

De Sousa v. Embassy of the Republic of Angola, 229 F. Supp. 3d 23 (D.D.C. 2017), 82

Dentons U.S. LLP v. The Republic of Guinea, 134 F. Supp. 3d 5 (D.D.C. 2015), 53

Devengoechea v. Bolivarian Republic of Venezuela, 889 F.3d 1213 (11th Cir. 2018), 56, 67

Doe I v. State of Israel, 400 F. Supp. 2d 86 (D.D.C. 2005), 72

Doe v. Bin Laden, 663 F.3d 64 (2d Cir. 2011), 107

Doe v. Federal Democratic Republic of Ethiopia, 851 F.3d 7 (D.C. Cir. 2017), 73

Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006), *aff'd in part, rev'd in part*, 557 F.3d 1066 (9th Cir. 2009), *cert. denied sub nom.* Holy See v. Doe, 130 S. Ct. 3497 (mem.) (2010), 71, 72

Doe v. Morgan Chase Bank, N.A., 899 F.3d 152 (2d Cir. 2018), 133

Dogan v. Barak, No. 2:15-cv-08130-ODW (GSJx), 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016), 46, 50

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), 10

EduMoz, LLC v. Republic of Mozambique, 686 F. App'x 486 (9th Cir. 2017), 43

EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635 (9th Cir. 2003), 36

El Omari v. Kreab (USA) Inc., 735 F. App'x 30 (2d Cir. 2018), 55

Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000), 113

Elbasir v. Kingdom of Saudi Arabia, 468 F. Supp. 2d 155 (D.D.C. 2007), 55

EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007), 84, 93

EM Ltd. v. Republic of Argentina, 695 F.3d 201 (2d Cir. 2012), *aff'd,* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014), 28, 88, 92

Embassy of Federal Republic of Nigeria v. Ugwuonye, 901 F. Supp. 2d 136 (D.D.C. 2012), 53

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005), 45

Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229 (D.D.C. 2006) (*Heiser I*), 102

Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9 (D.D.C. 2011) (*Heiser III*), 133, 135

Estate of Heiser v. Islamic Republic of Iran, 885 F. Supp. 2d 429 (D.D.C. 2012) (*Heiser IV*), 135

European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds,* 136 S. Ct. 2090 (2016), 40

European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189 (E.D.N.Y. 2011) (Appellate Brief for the U.S. as Amicus Curiae), 13

European Cmty. v. RJR Nabisco, No. 11-2475-CV, 2011 WL 4734329 (2d Cir. Oct. 5, 2011), 13

FG Hemisphere Assocs., LL.C. v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011), 89

FG Hemisphere Assocs. LL.C. v. République du Congo, 455 F.3d 575 (5th Cir. 2006), 82, 90

Fagot Rodriquez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002), 71

Fain v. Islamic Republic of Iran, 885 F. Supp. 2d 78 (D.D.C. 2012), 123

Farhang v. Indian Inst. of Tech., Kharagpur, 529 F. App'x 812 (9th Cir. 2013), 59

Figueirdo Ferraz e Engenharia de Projecto Ltda. v. Republic of Peru, 66 F.3d 384 (2d Cir. 2011), 77

Figueroa v. Ministry for Foreign Affairs of Sweden, 222 F. Supp. 3d 304 (S.D.N.Y. 2016), 25, 54

Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank, Ltd., No. 11 Civ. 0955 (PGG), 2011 WL 6187077 (S.D.N.Y. Nov. 28, 2011), 40

First City, Tex. Houston, N.A. v. Rafidain Bank, 197 F.R.D. 250 (S.D.N.Y. 2000), 86

First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48 (2d Cir. 2002), 89

First Merchants Collection Corp. v. Republic of Argentina, 190 F. Supp. 2d 1336 (S.D. Fla. 2002), 55

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) (*Bancec*), 24, 37, 38, 39, 83, 84, 134

Fischer v. Magyar Allamvasutak ZRT, 777 F.3d 847 (7th Cir. 2015), 68

Fisher v. Great Socialist People's Libyan Arab Jamahiriya, 541 F. Supp. 2d 46 (D.D.C. 2008), 112

Flanagan v. Islamic Republic of Iran, 190 F. Supp. 3d 138 (D.D.C. 2016), 20

Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93 (D.D.C. 2015), 110

Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998), 101

Foley v. Syrian Arab Republic, 249 F. Supp. 3d 186 (D.D.C. 2017), 110

Ford Motor Co. v. Russian Fed'n, No. 09 Civ. 1646 (JGK), 2010 WL 2010867 (S.D.N.Y. May 10, 2010), 52

Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990), 37

Fraenkel v. Islamic Republic of Iran, 248 F. Supp. 3d 21 (D.D.C. 2017), *aff'd in part,* 892 F.3d 348 (D.C. Cir. 2018), 105, 108, 109, 117

Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 362 (5th Cir. 2016), 25, 32, 59

Freeman v. HSBC Holdings PLC, No. 14-CV-6601 (DLI) (CLP), 2018 WL 3616845 (E.D.N.Y. July 27, 2018), 139

Fritz v. Islamic Republic of Iran, 320 F. Supp. 3d 48 (D.D.C. 2018), 114, 116

Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009), 21

Funk v. Belneftekhim, 861 F.3d 354 (2d Cir. 2017), 89

Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006), 43, 56, 63

Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53 (D.D.C. 2008), 107

Gates v. Syrian Arab Republic, 646 F. Supp. 2d 79 (D.D.C. 2009), 126

GDG Acquisitions LLC v. Government of Belize, 849 F.3d 1299 (11th Cir. 2017), 48

Georges v. United Nations, 834 F.3d 88 (2d Cir. 2016), 12

Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474 (E.D.N.Y. 2012), 120

Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88 (D.D.C. 2017), 30, 114

Giraldo v. Drummond, 808 F. Supp. 2d 247 (D.D.C. 2011), 11

Global Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co., 807 F.3d 806 (6th Cir. 2015), 31

Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Techsnabexport, 376 F.3d 282 (4th Cir. 2004), 53

Gomes v. ANGOP, Angola Press Agency, No. 11-CV-0580 (DLI) (JO), 2012 WL 3637453 (E.D.N.Y. Aug. 22, 2012), *aff'd*, 541 F. App'x 141 (2d Cir. 2013), 11–12, 35

Gray v. Permanent Mission of the People's Republic of the Congo, 443 F. Supp. 816 (S.D.N.Y.), *aff'd,* 580 F.2d 1044 (2d Cir. 1978), 36

GSS Group Ltd. v. National Port Auth., 680 F.3d 805 (D.C. Cir. 2014), 22

Guevara v. Republic of Peru, 608 F.3d 1297 (11th Cir. 2010), 53

Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69 (2d Cir. 2010), 60

Habyarimana v. Kagame, 821 F. Supp. 2d 1244 (W.D. Okla. 2011), *aff'd,* 696 F.3d 1029 (10th Cir. 2012), 11

Haim v. Islamic Republic of Iran, 784 F. Supp. 2d 1 (D.D.C. 2011), 110

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), 138

Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044 (D.C. Cir. 2014), 113

Hansen v. PT Bank Negara Indonesia (Persero), TBK, 601 F.3d 1059 (10th Cir. 2010), 31

Harrison v. Republic of Sudan, 802 F.3d 399 (2d Cir. 2015), *reh'g denied,* 838 F.3d 86 (2016), *petition for cert. granted,* 138 S. Ct. 2621, No. 16-1094 (Jan. 25, 2018), 19

Harrison v. Republic of Sudan, 838 F.3d 86 (2d Cir. 2016), *petition for cert. docketed,* Mar. 10, 2017 (No. 16-1094), 7

Hegna v. Islamic Republic of Iran, 380 F.3d 1000 (7th Cir. 2004), 95

Heiser v. Islamic Republic of Iran, 659 F. Supp. 2d 20 (D.D.C. 2009) (*Heiser II*), 121

Hekmati v. Islamic Republic of Iran, 278 F. Supp. 3d 145 (D.D.C. 2017), 113

Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 784 F. 3d 804 (D.C. Cir. 2015), *vacated and remanded on other grounds*, 137 S. Ct. 1312 (2017), 26, 66

Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, No. 13-7169, 2018 WL 460639 (Jan. 17, 2018) (Brief for the U.S. as Amicus Curiae), 67

Hill v. Republic of Iraq, 328 F.3d 680 (D.C. Cir. 2003), 120

Hmong I v. Lao People's Democratic Republic, No. 2:15-cv-2349 TLN AC, 2016 WL 2901562 (E.D. Cal. May 17, 2016) , 11

Howland v. Hertz Corp., 431 F. Supp. 2d 1238 (M.D. Fla. 2006), 35

Human v. Czech Republic-Ministry of Health, 824 F.3d 131 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1068 (2017), 75, 76

HWB Victoria Strategies Portfolio v. Republic of Argentina, No. 17-1085-JTM, 2017 WL 1738065 (D. Kan. May 4, 2017), 84

I.T. Consultants, Inc. v. Islamic Republic of Pakistan, 351 F.3d 1184 (D.C. Cir. 2003), 21

In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31 (D.D.C. 2009), 77, 98, 102, 124, 125, 127

In re Ohntrup, 628 F. App'x 809 (3d Cir. 2015), 84

In re Republic of the Philippines, 309 F.3d 1143 (9th Cir. 2002), 49

In re Terrorism Litig., 659 F. Supp. 2d 31 (D.D.C. 2009), 102

In Re: Terrorist Attacks, 298 F. Supp. 3d 6316 (S.D.N.Y. 2018), 137

In re Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631 (S.D.N.Y. 2018), 25, 27, 28, 119, 136, 137

In re Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005), 54, 71

In re Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71 (2d Cir. 2008), 44, 55, 106

In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 109 (2d Cir. 2013), 107, 138

In re Terrorist Attacks on Sept. 11, 2001, No. 03 MDL 1570 (GBD) (FM), 2017 WL 8639919 (S.D.N.Y. Nov. 9, 2017), 137

In re Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 (GBD) (SN), 2017 WL 2671083 (S.D.N.Y. June 21, 2017), 104

Jam v. International Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017), *cert. granted,* 138 S. Ct. 2026, May 21, 2018, 12

Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (D.D.C. 2001), *aff'd sub nom*. Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003), 113

Jerez v. Republic of Cuba, 777 F. Supp. 2d 6 (D.D.C. 2011), *aff'd*, 775 F.3d 419 (D.C. Cir. 2014), 35, 72, 73, 131, 132

Kalamazoo Spice Extraction Co. v. Provincial Military Gov't of Socialist Ethiopia*,* 729 F.2d 422 (6th Cir. 1984), 66

Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70 (2d Cir. 2002), 95

Keller v. Central Bank of Nigeria, 277 F.3d 811 (6th Cir. 2002), 45, 54

Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841 (5th Cir. 2000), 29

Kettey v. Saudi Ministry of Educ., 53 F. Supp. 3d 40 (D.D.C. 2014), 59

Kilburn v. Republic of Iran, 277 F. Supp. 2d 24 (D.D.C. 2003), 101

Kilburn v. Republic of Iran, 441 F. Supp. 2d 74 (D.D.C. 2006), 111

Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123 (D.C. Cir. 2004), 119

Kingdom of Spain v. Estate of Cassirer, No. 10-786, 2011 WL 2135028 (U.S. Sup. Ct. on petition for writ of certiorari, May 27, 2011) (Brief for the U.S. as Amicus Curiae), 68–69

Kingdom of Spain v. Estate of Cassirer, 564 U.S. 1037 (2011), 65

Kirschenbaum v. 650 Fifth Ave., 257 F. Supp. 3d 463 (S.D.N.Y. 2017), 134

Kirschenbaum v. 650 Fifth Ave. & Related Props., 830 F.3d 107 (2d Cir. 2016), 42, 132

Koehler v. Bank of Berm. Ltd., 12 N.Y.3d 533, 883 N.Y.S.2d 763 (2009), 91

Kumar v. Republic of Sudan, 880 F.3d 144 (4th Cir. 2018), *petition for cert. docketed,* Mar. 9, 2018, 19

LaLop v. United States, 29 F. Supp. 3d 530 (E.D. Pa. 2014), 68

Landgraf v. USI Film Prods., 511 U.S. 244 (1994), 124

Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769 (S.D.N.Y. 2012), 29

Lasheen v. Embassy of the Arab Republic of Egypt, 485 F. App'x 203 (9th Cir. 2012), 54

Lasheen v. Loomis Co., No. 2:01-cv-0227-KJM-EFB, 2017 WL 4410167 (E.D. Cal. Oct. 4, 2017), 87

Laventure v. United Nations, 279 F. Supp. 3d 394 (E.D.N.Y. 2017) (app. pending), 12

LeDonne v. Gulf Air, Inc., 700 F. Supp. 1400 (E.D. Va. 1988), 40

Leibovitch v. Islamic Republic of Iran, 297 F. Supp. 3d 816 (N.D. Ill. 2018), 6

Leibovitch v. Islamic Republic of Iran, 697 F.3d 561 (7th Cir. 2012), 108

Leibovitch v. Syrian Arab Republic, 25 F. Supp. 3d 1071 (N.D. Ill. 2014), 108

Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980), 73

Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), 54

Levin v. JPMorgan Chase Bank, N.A., No. 17-3854-cv, 2018 WL 4901585 (2d Cir. Oct. 9, 2018), 134

Lewis v. Mutond, 258 F. Supp. 3d 168 (D.D.C. 2017), 46

Liberian E. Timber Corp. v. Government of the Republic of Liberia, 659 F. Supp. 606 (D.D.C. 1987), 94

Licea v. Curacao, Nos. 11-15909, 11-15910, 11-15944, 2012 WL 3264655 (11th Cir. June 21, 2012), 31

Linde v. Arab Bank, PLC, 882 F.3d 314 (2d Cir. 2018), 99, 138

Lindsay v. Ports Am. Gulfport, Inc., Civil Action No. 16-3054, 2016 WL 3765459 (E.D. La. July 14, 2016), 23

Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989), 73

Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017), 21

Lord Day & Lord v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549 (S.D.N.Y. 2001), 65

Luxexpress 2016 Corp. v. Government of Ukraine, No. 15-CV-4880 (VSB), 2018 WL 1626143 (S.D.N.Y. Mar. 30, 2018), 23

Maalouf v. Islamic Republic of Iran, 306 F. Supp. 3d 203 (D.D.C. 2018), 109

Magness v. Russian Fed'n, 84 F. Supp. 2d 1357 (S.D. Ala. 2000), 13

Magness v. Russian Fed'n, 247 F.3d 609 (5th Cir. 2001), 35, 43

Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005), 13

Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322 (D.D.C. 2007), 13

Manoharan v. Rajapaksa, 711 F.3d 178 (D.C. Cir. 2013), 11

Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd on other grounds,* 563 F.3d 9 (2d Cir. 2009), 15, 45, 46

McEachern v. Inter-Country Adoption Bd., 62 F. Supp. 3d 187 (D. Mass. 2014), 21

McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008), 66

McKesson Corp. v. Islamic Republic of Iran, Civ. Action No. 82-0220 (RJL), 2009 WL 4250767 (D.D.C. Nov. 23, 2009), 66

McKesson Corp. v. Islamic Republic of Iran, No. 10-7174, 2011 WL 3209069 (D.C. Cir. July 27, 2011), 67

Merlini v. Canada, 280 F. Supp. 3d 254 (D. Mass. 2017), 71

Mezerhane v. Republica Bolivariana de Venezuela, 785 F.3d 545 (11th Cir. 2015), *cert. denied,* 136 S. Ct. 800 (2016), 14, 67, 68

Miango v. Democratic Republic of Congo, 288 F. Supp. 3d 117 (D.D.C. 2018), 25, 72, 120

Micula v. Government of Romania, 714 F. App'x 18 (2d Cir. 2017), 10, 77

Ministry of Def. & Support v. Elahi, 546 U.S. 450 (2006), 96

Ministry of Def. & Support for Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366 (2009), 35, 95

MMA Consultants 1, Inc. v. Republic of Peru, 245 F. Supp. 3d 486 (S.D.N.Y. 2017), 59

MMA Consultants 1, Inc. v. Republic of Peru, 719 F. App'x 47 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 85 (2018), 27, 57

Mobil Cerro Negro, Ltd. v. Venezuela, 863 F.3d 96 (2d Cir. 2017), 77

Mohammadi v. Islamic Republic of Iran, 782 F.3d 9 (D.C. Cir. 2015), 104

MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326 (9th Cir. 1984), 55

Moore v. United Kingdom, 384 F.3d 1079 (9th Cir. 2004), 11

Moradi v. Islamic Republic of Iran, 77 F. Supp. 3d 57 (D.D.C. 2015), 109

Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51 (D.D.C. 2010), 104, 122, 124

Murphy v. Islamic Republic of Iran, 778 F. Supp. 2d 70 (D.D.C. 2011), 31

National City Bank of New York v. Republic of China, 348 U.S. 356 (1955), 5

Nemariam v. Federal Democratic Republic of Ethiopia, 491 F.3d 470 (D.C. Cir. 2007), 65

Newman v. Republic of Bulgaria, No. 16 Civ. 9268 (JFK), 2017 WL 1655248 (S.D.N.Y. May 2, 2017), 72

NML Capital, Ltd. v. Banco Central de la Republica Argentina, 652 F.3d 172 (2d Cir. 2011), *cert. denied,* 567 U.S. 944 (2012), 85

NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254 (2d Cir. 2012), *cert. denied,* 133 S. Ct. 273 (2012), 94

NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P., 788 F. Supp. 2d 111 (C.D. Cal. 2011), 93

Nnaka v. Federal Republic of Nigeria, 238 F. Supp. 3d 17 (D.D.C. 2017), 14, 46

Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela, 575 F.3d 491 (5th Cir. 2009), 25

Nwoke v. Consulate of Nigeria, 729 F. App'x 478 (7th Cir. 2018), 53–54

Nwoke v. Consulate of Nigeria, No. 17-cv-00140, 2018 WL 1071445 (N.D. Ill. Feb. 27, 2018), 36, 71

O'Bryan v. Holy See, 556 F.3d 361, 381 (6th Cir. 2009), 25, 34, 72

OBB Personenverhehr AG v. Sachs, 136 S. Ct. 390 (2015), 2, 56

Odhiambo v. Republic of Kenya, 930 F. Supp. 2d 17 (D.D.C. 2013), *aff'd,* 764 F.3d 31 (D.C. Cir. 2014), *cert. denied,* 136 S. Ct. 2504 (2016), 46, 63

Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159 (11th Cir. 2011), 53

Olympic Chartering S.A. v. Ministry of Indus. & Trade of Jordan, 134 F. Supp. 2d 528 (S.D.N.Y. 2000), 84

Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44 (D.D.C. 2012), 108, 125

Owens v. Bank Paribas S.A., 235 F. Supp. 3d 855 (D.D.C. 2017), 138

Owens v. BNP Paribas, S.A., 897 F.3d 266 (D.C. Cir. 2018), 99

Owens v. Republic of Sudan, 531 F.3d 885 (D.C. Cir. 2008), 126

Owens v. Republic of Sudan, 826 F. Supp. 2d 128 (D.D.C. 2011), 107

Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017), *petition for cert. docketed* (Mar. 6, 2018), 99, 105, 113, 114, 119, 124

Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds,* 538 U.S. 468 (2003), 42

Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007), 47

Petersen Energia Inversora S.A.U. v. Argentine Republic and YPF S.A, 895 F.3d 194 (2d Cir. 2018), 32

Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25 (D.D.C. 2007), 104

Peterson v. Islamic Republic of Iran, 563 F. Supp. 2d 268 (D.D.C. 2008), 29

Peterson v. Islamic Republic of Iran, 627 F.3d 1117 (9th Cir. 2010), 82, 90, 92, 122

Peterson v. Islamic Republic of Iran, 876 F.3d 63 (2d Cir. 2017), 90, 91, 92

Peterson v. Royal Kingdom of Saudi Arabia, 332 F. Supp. 2d 189 (D.D.C. 2004), 65

Phaneuf v. Republic of Indonesia, 106 F.3d 302 (9th Cir. 1997), 43

Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018), 65, 67

Phoenix Consulting Inc. v. Republic of Angola, 35 F. Supp. 2d 14 (D.D.C. 1999), 49

Politis v. Gavriil, Civil Action No. H-08-2988, 2008 WL 4966914 (S.D. Tex. Nov. 19, 2008), 12

Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224 (2007), 23

Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987), 52

Pravin Banker Assocs. Ltd. v. Banco Popular del Peru, 109 F.3d 850 (2d Cir. 1997), 87

Prewitt Enters., Inc., v. Organization of Petroleum Exporting Countries, 353 F.3d 916 (11th Cir. 2003), 13

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002), 21, 68, 99, 112, 113, 116

Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), 62, 63

Pugh v. Socialist People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54 (D.D.C. 2003), 101, 115

Rana v. Islam, 305 F.R.D. 53 (S.D.N.Y. 2015), 11

Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part*, 162 F.3d 748 (2d Cir. 1998), 115

Reiss v. Société Centrale du Groupe Des Assurance Nationales, 235 F.3d 738 (2d Cir. 2000), 28

Republic of Argentina v. NML Capital, Inc., 134 S. Ct. 2250 (2014), 6, 69, 83, 88, 89, 90, 92

Republic of Argentina v. Weltover, 504 U.S. 607 (1992), 10, 21, 51, 52, 58, 93

Republic of Austria v. Altmann, 541 U.S. 677 (2004), 5, 6, 7, 10, 14

Republic of Iraq v. Beaty, 556 U.S. 848, 129 S. Ct. 2183 (2009), 111, 124, 125

Republic of Philippines v. Pimentel, 553 U.S. 851 (2008), 30

Republic of Sudan v. Harrison, No. 16-1094, 2018 WL 2357724 (U.S. Sup. Ct. May 22, 2018) (Brief for the U.S. as Amicus Curiae), 19

Ricaud v. American Metal Co., 246 U.S. 304 (1918), 14

Roeder v. Islamic Republic of Iran, 333 F.3d 228 (D.C. Cir. 2003), 35

Roeder v. Islamic Republic of Iran, 742 F. Supp. 2d 1 (D.D.C. 2010), 98

Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131 (2d Cir. 2012), 59

Rong v. Liaoning Provincial Gov't, 452 F.3d 883 (D.C. Cir. 2006), 52

Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014), 46

Rote v. Zel Custom Mfg. LLC, 816 F.3d 383 (9th Cir. 2016), 52

Roth v. Islamic Republic of Iran, 78 F. Supp. 3d 379 (D.D.C. 2015), 108, 110

Roth v. Syrian Arab Republic, Civ. No. 1:14-cv-01946-RCL, 2018 WL 4680270 (D.D.C. Sept. 28, 2018), 119, 122, 125

Rothstein v. UBS AG, 708 F.3d 82 (2d Cir. 2013), 138

Rowell v. Franconia Minerals Corp., 706 F. Supp. 2d 891 (N.D. Ill. 2010), 44

Rubin v. Islamic Republic of Iran, 137 S. Ct. 2326 (2017), 65

Rubin v. Islamic Republic of Iran, 33 F. Supp. 3d 1003 (N.D. Ill. 2014), 61

Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 1108 (N.D. Ill. 2004), 87

Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549 (N.D. Ill. 2005), 81

Rubin v. Islamic Republic of Iran, 456 F. Supp. 2d 228 (D. Mass. 2006), 130

Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), 28, 87, 88, 128

Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016), *affirmed*, 138 S. Ct. 816 (2018), 92, 135

Rux v. Republic of Sudan, 461 F.3d 461 (4th Cir. 2006), 116, 117, 118, 119, 120

Rux v. Republic of Sudan, 672 F. Supp. 2d 726 (E.D. Va. 2009), 107

S.K. Innovation, Inc. v. Finpol, 854 F. Supp. 2d 99 (D.D.C. 2012), 11, 54

SACE S.p.A. v. Republic of Paraguay, 243 F. Supp. 3d 21 (D.D.C. 2017), 44

Sachs v. Republic of Austria, 695 F.3d 1021 (9th Cir. 2012), 39

Salman v. Saudi Arabian Cultural Mission, No. 1:16cv1033 (JCC IDD), 2017 WL 176576 (E.D. Va. Jan. 17, 2017), 44, 54

Samantar v. Yousuf, 560 U.S. 305 (2010), 7, 9, 12, 44, 45, 55, 106, 117

Saudi Arabia v. Nelson, 507 U.S. 349 (1993), 9, 17, 52, 56

Schermerhorn v. State of Israel, 235 F. Supp. 3d 249 (D.D.C. 2017), *aff'd on other grounds*, 876 F.3d 351 (D.C. Cir. 2017), 7, 27, 71, 72

Sea Breeze Salt, Inc. v. Mitsubishi Corp., 899 F.3d 1064 (9th Cir. 2018), 14

Securities Investor Prot. v. Bernard L. Madoff Inv. Sec. LLC, 480 B.R. 501 (S.D.N.Y. 2012), 59

Seijas v. Republic of Argentina, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, (S.D.N.Y. March 28, 2011), *aff'd*, 502 F. App'x 19 (2d Cir. 2012), 38

SerVaas Inc. v. Mills, Nos. 14-385, 14-438, 14-569, 2014 WL 4656925 (Sept. 9, 2014), 89

Servaas Inc. v. Republic of Iraq, 653 F. App'x 22 (2d Cir. 2011), 43

Sheikh v. Republic of Sudan, 308 F. Supp. 3d 46 (D.D.C. 2018), 109

Shoham v. Islamic Republic of Iran, Civil No. 12-cv-508 (RCL), 2017 WL 2399454 (D.D.C. June 1, 2017), 22, 27, 125

SI Group Consort Ltd. v. Ukraine, Ivano-Frankivsk State Admin., No. 15 CV 3047-LTS, 2017 WL 398400 (S.D.N.Y. Jan. 30, 2017), 49

Sikhs for Justice v. Singh, 64 F. Supp. 3d 190 (D.D.C. 2014), 11

Simon v. Republic of Hungary, 277 F. Supp. 3d 42 (D.D.C. 2017), 69

Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016), 11, 15, 26, 67, 68, 70

Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), 124, 125

Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230 (D.C. Cir. 2003), 116, 122

Simpson v. Socialist People's Libyan Arab Jamahiriya, 470 F.3d 356 (D.C. Cir. 2006), 116

Singh v. Singapore Hous. & Dev. Bd., No. 1:15-cv-02240-DAP, 2017 WL 2378120 (N.D. Ohio June 1, 2017), 52

Skanga Energy & Marine Ltd. v. Avervenca S.A., 875 F. Supp. 2d 264 (S.D.N.Y. June 21, 2012), 59

Smith v. Overseas Korean Cultural Heritage Found., 279 F. Supp. 3d 293 (D.D.C. 2018), 23

Sokolow v. Palestine Liberation Org., No. 16-1071, 2018 WL 1256160 (Feb. 22, 2018), 21

Stansell v. Republic of Cuba, 217 F. Supp. 3d 320 (D.D.C. 2016), 109, 118

Sukyas v. Romania, No. CV 15-1946 FMO (JCx), 2017 WL 6550588 (C.D. Cal. Sept. 21, 2017), 25, 70

Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001), 113

Taamneh v. Twitter, Inc., No. 17-cv-04107-EMC, 2018 WL 5729232 (N.D. Cal. Oct. 29, 2018), 139

Tatneft v. Ukraine, 301 F. Supp. 3d 175 (D.D.C. 2018), 23, 25

Taylor v. Islamic Republic of Iran, 811 F. Supp. 2d 1 (D.D.C. 2011), 118, 125

Terenkian v. Republic of Iraq, 694 F.3d 1122 (9th Cir. 2012), *reh'g denied,* 704 F.3d 814 (9th Cir. 2013), *cert. denied sub nom.* Pentonville Developers, Inc. v. Republic of Iraq, 571 U.S. 818 (2013), 31, 58, 61

Thai Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic, No. 10 Civ. 5256 (KMJ), 2011 WL 4111504 (S.D.N.Y. Sept. 13, 2011), 87

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), 5, 6

Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22 (D.D.C. 2016), 25, 99, 108, 109, 118, 123

TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296 (D.C. Cir. 2005), 22, 43, 77, 95

Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994), 35, 42

Triple A Int'l, Inc. v. Democratic Republic of the Congo, 721 F.3d 415 (6th Cir. 2013), 58

UNC Lear Services, Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210 (5th Cir. 2009), 53

Ungar v. Palestine Liberation Org., 402 F.3d 274 (1st Cir. 2005), 34

United States v. Khobragade, 15 F. Supp. 3d 383 (S.D.N.Y. 2014), 11

United States v. Al Sharaf, 183 F. Supp. 3d 45 (D.D.C. 2016), 11

USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namibia, 681 F.3d 103 (2d Cir. 2012), 36

Valencia v. Islamic Republic of Iran, 774 F. Supp. 2d 1 (D.D.C. 2010), 117

Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52 (D.D.C. 2010), 22, 121, 125

Velasco v. Government of Indonesia, 370 F.3d 392 (4th Cir. 2004), 44

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), 1, 6, 7, 17, 23, 25, 26, 47

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993), 20

Von Saher v. Norton Simon Museum of Art at Pasadena, 897 F.3d 1141 (9th Cir. 2018), 14

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990), 14

Waldman v. Palestine Liberation Org., 835 F.3d 317 (D.C. Cir. 2016), *cert. denied sub nom.* Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438 (2018), 34, 99

Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229 (5th Cir. 2004), 81, 93, 94

Walters v. Industrial and Commercial Bank of China, Ltd., 651 F.3d 280 (2d Cir. 2011), 82

Walters v. People's Republic of China, 672 F. Supp. 2d 573 (S.D.N.Y. 2009), 87, 90

Wamai v. Republic of Sudan, 60 F. Supp. 3d 84 (D.D.C. 2014), 123

Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004), 11

Weininger v. Castro, 462 F. Supp. 2d 457 (S.D.N.Y. 2006), 95

Weinstein v. Islamic Republic of Iran, 299 F. Supp. 2d 63 (S.D.N.Y. 2004), 133

Weinstein v. Islamic Republic of Iran, 609 F.3d 43 (2d Cir. 2010), 131

Weinstein v. Islamic Republic of Iran, 831 F.3d 470 (D.C. Cir. 2016), 7

Westfield v. Federal Republic of Germany, 633 F.3d 409 (6th Cir. 2011), 60

Williams v. National Gallery of Art, London, No. 16-CV-6978 (VEC), 2017 WL 4221084 (S.D.N.Y. Sept. 21, 2017), *aff'd on other grounds,* No. 17-3253-cv, 2018 WL 4293327 (2d Cir. Sept. 10, 2018), 48

World Wide Demil, L.L.C. v. Nammo, A.S., 51 F. App'x 403 (4th Cir. 2002), 49

Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24 (D.D.C. 2012), 110, 126

Wultz v. Islamic Republic of Iran, No. 08-cv-1460 (RCL), 2010 WL 4190277 (D.D.C. Oct. 20, 2010), 126

Wyatt v. Syrian Arab Republic, 266 F. App'x 1 (D.C. Cir. 2008), 126

Wyatt v. Syrian Arab Republic, 362 F. Supp. 2d 103 (D.D.C. 2005), 114

Wyatt v. Syrian Arab Republic, 736 F. Supp. 2d 106 (D.D.C. 2010), 126

Wyatt v. Syrian Arab Republic, 83 F. Supp. 3d 192 (D.D.C. 2015), 134

Wyatt v. Syrian Arab Republic, 908 F. Supp. 2d 216 (D.D.C. 2012), 126

Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205 (4th Cir. 2011), 35

Yang Rong v. Liaoning Provincial Gov't, 362 F. Supp. 2d 83 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006), 34–35, 56, 65

Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009), *aff'd*, Samantar v. Yousuf, 560 U.S. 305 (2010), 45

Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012), 46

Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247 (2d Cir. 2000), 66

Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012), 14

Other Authorities

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 974 U.N.T.S. 178, 24 U.S.T. 564, T.I.A.S. No. 7570, 114, 115

Convention on Privileges and Immunities of the United Nations, *opened for signature* Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force with respect to the United States Apr. 29, 1970), 12

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 261, T.I.A.S. No. 6638 (entered into force for the United States Feb. 10, 1969), 18, 20

H.R. Rep. No. 94-1487, at 19 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6004, 6618, 6, 31, 37, 66, 86

H.R. Rep. No. 103-702, at 12 (1994), 99

H.R. Rep. No. 104-383, at 62 (1995), 100

Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975), 75

International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 45, U.N. Doc. A/34/45, at 245 (June 3, 1983), 1316 U.N.T.S. 205, T.I.A.S. No. 1108, 18 I.L.M. 1456 (entered into force for the United States Jan. 6, 1985), 115

International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1291, T.I.A.S. No. 6090, 75

Restatement (Fourth) of Foreign Relations Law § 441 (Am. Law Inst. 2018), 14

Restatement (Fourth) of Foreign Relations Law § 452, cmt. a (Am. Law Inst. 2018), 34

Restatement (Fourth) of Foreign Relations Law § 452, Reporters' Note 4 (Am. Law Inst. 2018), 43

Restatement (Fourth) of Foreign Relations Law § 452, Reporters' Note 5 (Am. L. Inst. 2018), 42

Restatement (Fourth) of Foreign Relations Law § 452, Reporters' Note 9 (Am. Law Inst. 2018), 65

Restatement (Fourth) of Foreign Relations Law § 453 (Am. Law Inst. 2018), 48

Restatement (Fourth) of Foreign Relations Law § 453, Reporters' Note 10 (Am. Law Inst. 2018), 50

Restatement (Fourth) of Foreign Relations Law § 454 (Am. Law Inst. 2018), 51

Restatement (Fourth) of Foreign Relations Law, § 454, cmt.(f) and Reporters' Note 9 (Am. Law Inst. 2018), 21

Restatement (Fourth) of Foreign Relations Law § 455 (Am. Law Inst. 2018), 64

Restatement (Fourth) of Foreign Relations Law § 455, Reporters' Note 6 (Am. Law Inst. 2018), 67

Restatement (Fourth) of Foreign Relations Law § 455, Reporters' Note 11 (Am. Law Inst. 2018), 68, 69

Restatement (Fourth) of Foreign Relations Law § 457 (Am. Law Inst. 2018), 72

Restatement (Fourth) of Foreign Relations Law § 458 (Am. Law Inst. 2018), 74

Restatement (Fourth) of Foreign Relations Law § 460 (Am. Law Inst. 2018), 98

Restatement (Fourth) of Foreign Relations Law § 461 (Am. Law Inst. 2018), 18

Restatement (Fourth) of Foreign Relations Law § 462 (Am. Law Inst. 2018), 28

Restatement (Fourth) of Foreign Relations Law § 463 (Am. Law Inst. 2018), 31

Restatement (Fourth) of Foreign Relations Law § 464 (Am. Law Inst. 2018), 81

Restatement (Fourth) of Foreign Relations Law § 464, Reporters' Note 13 (Am. Law Inst. 2018), 89

Restatement (Second) of Torts (Am. Law Inst. 1965), 118, 121

Restatement (Third) of Foreign Relations Law § 213 (Am. Law Inst. 1986), 44

Restatement (Third) of Foreign Relations Law, § 713 cmt. f. and Reporters' Note 3 (Am. Law Inst. 1987), 68

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (in force for the United States, Nov. 20, 1994), 112

United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf, 24

United Nations Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, 75

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force for the United States Dec. 24, 1969), 85, 129

Vienna Convention on Diplomatic Relations, Apr. 18, 1961 [1972], 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972), 85, 129

Acts

Anti-Terrorism Act, 18 U.S.C. § 2333(a) (1992), 98, 120

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)), 97

Arms Export Control Act, 111

Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, Div. A, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605 note (2006)), 101

Emergency Wartime Supplemental Act of 2003, Pub. L. No. 108–11, 117 Stat. 559, 111

Export Administration Act of 1979, initially codified at 50 U.S.C. app. § 2405(j), later transferred to 50 U.S.C. § 4605, 100, 111

Federal Arbitration Act, 9 U.S.C. §§ 201–207 (2010), 75

Foreign Assistance Act of 1961 (codified at 22 U.S.C. § 2371), 100, 111, 132

Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016, Pub. L. No. 114–319, Dec. 16, 2016, 130 Stat. 1618 (codified at 28 U.S.C. § 1608(h) (2016)), 13

Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602-11 (2000)), 1

Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016) (codified at 22 U.S.C. § 1621 note), 13

Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(3)(B)(vi), 132

Immunity from Seizure Act, 22 U.S.C. § 2459, 13

International Emergency Economic Powers Act (IEEPA) (50 U.S.C.A. §§ 1701 and 1702), 133

International Organizations Immunities Act (IOIA), Dec. 29, 1945, ch. 652, Title I, 59 Stat. 669 (codified as amended at 22 U.S.C. §§ 288–288*l*), 12, 128

Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, Sept. 28, 2016, 130 Stat. 853 (codified at 28 U.S.C. § 1605B), 98, 136

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a) and (b) (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A), 77, 97, 124, 134

Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified at 28 U.S.C. § 1610 note) (2002), 95, 131, 132, 133

Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note) (1991), 98, 99, 112, 113

Trading With the Enemy Act (TWEA), Act of Oct. 6, 1917, 40 Stat. 411 as amended, 50 U.S.C. app. 4305, 133, 135

UN Participation Act of 1945 (codified at 22 U.S.C. § 287–287e-3), 12, 133

Victims of Trafficking and Violence Protection Act of 2000, 95

Rules

Fed. R. Civ. P. 4(j), 18
Fed. R. Civ. P. 12 (b)(1), 25
Fed. R. Civ. P. 12(b)(6), 110
Fed. R. Civ. P. 19, 30
Fed. R. Civ. P. 37, 89
Fed. R. Civ. P. 56, 25, 110
Fed. R. Civ. P. 69(a), 85
Fed. R. Civ. P. 89, 37

About the Author

David P. Stewart is Professor from Practice at Georgetown University Law Center, where he has taught courses in public and private international law, foreign relations law, international criminal law, international human rights, international immunities, and international law in domestic courts. He joined the Georgetown faculty in 2008 following his retirement from the U.S. Department of State, where he worked in the Office of the Legal Adviser for thirty-three years. He served as Assistant Legal Adviser for Private International Law, for Diplomatic Law and Litigation, Law Enforcement and Intelligence, and for Human Rights and Refugees, among other positions. Before joining the government, he was in private practice with Donovan Leisure Newton & Irvine in commercial and antitrust litigation.

Professor Stewart served as one of the co-reporters for the American Law Institute's *Restatement of the Law Fourth, the Foreign Relations Law of the United States* (2018). From 2008 to 2016, he was a member of the Inter-American Juridical Committee, which advises the Organization of American States on juridical matters of an international nature and promotes the progressive development and codification of international law. From 2014 to 2018, he was President of the American Branch of the International Law Association, and he now chairs the Board of Directors. He is a member of the Board of Editors of the American Journal of International Law and the Secretary of State's Advisory Committee on Private International Law. He previously served on the Executive Councils of the American Society of International Law and the ABA's Section of International Law.

Comments and suggestions about this guide should be sent to the author at stewartd@law.georgetown.edu.

The Federal Judicial Center

Board

The Chief Justice of the United States, Chair
Magistrate Judge Tim A. Baker, U.S. District Court for the Southern District of Indiana
Judge Duane Benton, U.S. Court of Appeals for the Eighth Circuit
Judge Curtis L. Collier, U.S. District Court for the Eastern District of Tennessee
Chief Judge Barbara J. Houser, U.S. Bankruptcy Court for the Northern District of Texas
Judge Kimberly J. Mueller, U.S. District Court for the Eastern District of California
Judge George Z. Singal, U.S. District Court for the District of Maine
Judge David S. Tatel, U.S. Court of Appeals for the District of Columbia Circuit
James C. Duff, Director of the Administrative Office of the U.S. Courts

Director

John S. Cooke

Deputy Director

Clara Altman

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.